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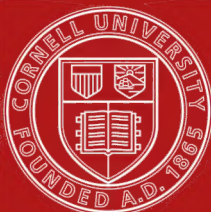
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# COMMENTARIES

ON THE

# PRESENT LAWS OF ENGLAND

BY

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### INTRODUCTORY.

It has already been pointed out that by the 34th section of the Judicature Act, 1873, which came into operation on the 2nd of November, 1875, certain business has, subject to the power of transfer vested in the High Court of Justice, been assigned to the Chancery Division. These subjects, along with others, which seem to fall most appropriately within this portion of our work, shall now be considered in the following order :—

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## CHAPTER I.

### TRUSTS.

A trust may be described generally as an obligation affecting property, legally vested in one or more (the trustee or trustees), which obligation he is, or they are, bound to perform, wholly or partially, for the benefit of another or others (the *cestui que trust* or *cestuis que trust*) in whom the equitable interest is vested <sup>(1)</sup>. Generally speaking any property whether real or personal may be made the subject of a trust.

A trust has also been defined as a “beneficial interest in or

(1) Watson's Compendium of Equity, p. 959.

**Definition.** beneficial ownership of real or personal property unattended with the legal or possessory ownership thereof." This definition, which has been adopted by several subsequent writers, has been made the subject of somewhat severe criticism <sup>(1)</sup>, but it may serve to bring clearly before the mind of the reader the general idea of a trust <sup>(2)</sup>.

**Creation of trust.**

For the purpose of creating a trust it is necessary to have (1) a settlor; (2) a trustee; (3) a *cestui que trust*. It is an established rule of the Court never to allow a trust to fail for the want of a trustee. Accordingly, if no trustee be named, or if he die in the lifetime of the testator, or if he be an improper or incapable person, yet the trust shall prevail <sup>(3)</sup>. "The Court has from a very early period decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, a Court of Equity does not, it is true, set aside the Act of Parliament, but it fastens upon the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way a Court of Equity has dealt with the Statute of Frauds, and in this manner it also deals with the Statute of Wills" <sup>(4)</sup>. The selection of some person to act as trustee is with the settlor. Where trusts and powers require the exercise of judgment and discretion, such trusts and powers are supposed by the Court to have been committed by the testator or settlor to the trustees whom he appoints by reason of his personal confidence in them. The settlor may also so act as to constitute himself a trustee for those whom he intends to benefit <sup>(5)</sup>.

Where any formalities are prescribed by law for the declaration or creation of the trust they must be observed, and the object of the trust must be lawful <sup>(6)</sup>.

The subject of the creation and transfer of trusts was

<sup>(1)</sup> Underhill on Trusts, p. 2, *et seq.*

<sup>(2)</sup> See an elaborate discussion on the early history of trusts in Lewin on Trusts, p. 1, 8th ed. Littleton's definition of a trust of real property founded on the definition of a use is as follows:—"A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by *subpoena* in Chancery," *i.e.* now by an application to the Chancery Division (sect. 34 of the

Judicature Act, 1873).

<sup>(3)</sup> *Gravenor v. Hallum*, Amb. 643; *Robinson v. Flight*, 4 D. G. J. & S. 608.

<sup>(4)</sup> Per Lord Westbury in, *McCormick v. Grogan*, L. R. 4 H. L. 82.

<sup>(5)</sup> To render a gift or voluntary trust valid there must be what amounts to either a complete transfer of the property, or a valid declaration of trust: *Richards v. Delbridge*, L. R. 18 Eq. 11.

<sup>(6)</sup> Per Lord O'Hagan, *Dawkins v. Lord Penrhyn*, 4 App. Cas. 51, 68.



specially dealt with by the Legislature in the Statute of Frauds, (29 Car. 2, c. 3). Statute of Frauds.

The 7th section of that statute provides that all declarations or creations of trusts or confidences of *any lands, tenements, or hereditaments*, shall be void unless manifested and proved by some writing signed by the party who is by law enabled to declare such trusts, or by his last will in writing. The manifestation and proof of the trust required by the statute will, however, be satisfied by any subsequent declaration by the trustee, or by an express declaration by him, a memorandum to that effect, a letter under his hand, &c., and the trust, however late the proof of it may be, operates retrospectively from the date of its creation <sup>(1)</sup>.

Sect. 8 of the Statute of Frauds excepts all trusts arising or resulting by implication or construction of law, or transferred or extinguished by act or operation of law.

Sect. 9 of the Statute of Frauds provides that all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same or by his last will.

It is to be observed that sect. 7, dealing with the creation of trusts, applies to freeholds, copyholds, and leaseholds, but not to personal property, nor to money secured on mortgage of real estate <sup>(2)</sup>, while sect. 9, dealing with grants or assignments of trust, applies to trusts of all descriptions.

The next question to be considered is who may be trustees.

A married woman may be a trustee, but it is generally considered undesirable that she should be appointed.

Who may be trustees.

The separate property of married women is now, by the Married Women's Property Act, 1882, rendered liable for their breaches of trust, and sect. 15 expressly provides that a married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly of property subject to any trust, may sue or be sued, and may transfer or join in transferring stocks, funds, &c., in that character, without her husband, as if she were a *feme sole* <sup>(3)</sup>.

<sup>(1)</sup> Lewin on Trusts, 8th ed. 55 and 56; *Middleton v. Pollock*, 4 Ch. D. 49. The person to declare the trust within the meaning of this section is the beneficial owner: *Kronheim v. Johnson*, 7 Ch. D. 60; following *Tierney v. Wood*, 19 Beav. 330.

<sup>(2)</sup> *Withers v. Withers*, Amb. 152;

*Forster v. Hale*, 3 Ves. 696; *McFadden v. Jenkyns*, 1 Ph. 153, 157; *Hawkins v. Gardiner*, 2 Sm. & G. 441, 451; *Benbow v. Townsend*, 1 My. & K. 506; see also *Davies v. Otty*, 33 Beav. 540.

<sup>(3)</sup> 45 & 46 Vict. c. 75, ss. 1, 18, 24, and see *Docwra v. Faith*, 29 Ch. D. 693.

Married  
Women's  
Property  
Act.

It must, however, not be forgotten that where a married woman is appointed a trustee, or marries after the 1st of January, 1883 (the date when the Married Women's Property Act, 1882, came into operation), the husband is exempted from all liability in respect of her breaches of trust committed during the coverture, unless he has acted or intermeddled in the trust; and that, as pointed out by Mr. Lewin, the relief thus afforded to the husband has, by taking away from the *cestui que trust* the security of the husband's liability, rendered the appointment of a married woman trustee at least as impolitic as it was before the Act.

The Court formerly declined to appoint a *feme sole* trustee, but such an appointment has been made in recent years <sup>(1)</sup>.

Infants.

An infant may but ought not to be appointed a trustee.

*Cestuis que trust.*

*Cestuis que trust*, or the husbands of such of them as are married <sup>(2)</sup>, or relatives <sup>(3)</sup>, ought not to be appointed, unless no one else can be found to accept the office.

Aliens.

Aliens may be trustees, but an objection to their appointment exists, viz., the circumstance that if domiciled abroad they are not subject to the jurisdiction of the Court.

Bankrupts.

Bankrupts may be trustees, but bankruptcy is, generally speaking, a ground for the removal of a trustee <sup>(4)</sup>.

Trusts when considered with reference to their creation or origin may be divided into trusts which are created by the act of a party, and those which arise from the operation of law. Trusts which arise from the operation of law are of two kinds, resulting trusts and constructive trusts.

Creation of trusts.

The creation of a trust is a question of intention. No technical expressions are needed, providing the intention to create one is clear <sup>(5)</sup>; there is "no magic in the word 'trust'" <sup>(6)</sup>; and the use of it will not operate to create one unless the surrounding circumstances evidence such an intention <sup>(7)</sup>.

Trusts may, as we have said, be divided into two classes, viz.,

<sup>(1)</sup> *Re Campbell's Trusts*, 31 Beav. 176; *Re Berkley*, L. R. 9 Ch. 720.

<sup>(2)</sup> *Re Hattatt*, 18 W. R. 416; *Re Parrott*, 30 W. R. 97; *Re Lightbody*, 33 W. R. 452.

<sup>(3)</sup> *Wilding v. Bolder*, 21 Beav. 222; *Re Davis*, L. R. 12 Eq. 214.

<sup>(4)</sup> *In re Barker's Trusts*, 1 Ch. D. 43; *In re Adams' Trust*, 12 Ch. D. 634. Bodies corporate of boroughs may in certain cases be treated as trustees: 45 & 46 Vict. c. 50. The Bank of England cannot be made a trustee; and see as to the National Debt Commissioners and Savings

Banks, 45 & 46 Vict. c. 51; see as to trust company, *Law Guarantee and Trust Society v. Bank of England*, 24 Q. B. D. 406 and as to companies not being bound to notice trusts, *Re Perkins*, 24 Q. B. D. 613.

<sup>(5)</sup> *Dipple v. Corles*, 11 Hare, 184.

<sup>(6)</sup> *Kinloch v. Secretary of State for India*, 7 App. Cas. 619, 630.

<sup>(7)</sup> *Dawkins v. Lord Penrhyn*, 4 App. Cas. 51; *Thompson v. Eastwood*, 2 App. Cas. 215; *Attorney-General v. The Wax Chandlers' Co.*, L. R. 6 H. L. 1.

into those arising by act of the party, and those arising by operation of law, but perhaps the best division is that which separates them into three classes: (1) Express trusts; (2) Implied trusts; (3) Constructive trusts. Division of trusts.

An express trust is one "created *eo nomine* or by a gift to a trustee of property not merely charged with or subject to a payment, but so dedicated by clear and distinct words, either in writing or orally <sup>(1)</sup>, as to fix on the trustee a fiduciary obligation to apply it for that special purpose" <sup>(2)</sup>.

An implied trust is one which is founded on an unexpressed but presumable intention <sup>(3)</sup>.

A constructive trust is a trust which is raised by the construction of equity in order to satisfy the demands of justice and good conscience without reference to any presumable intention of the parties.

Express trusts are divided into trusts executed and trusts executory. An executed trust is one which is finally declared by the instrument creating it, "Where" in Mr. Lewin's words, "the limitations of the equitable interest are complete and final."

A trust executory is one which is *not* so formally and finally declared, which is to be executed by the preparation of a complete and formal settlement, carrying into effect, through the operation of an apt and detailed legal phraseology, the general intention compendiously indicated by the settlor.

The question to be determined in every case, as was stated by Lord St. Leonards in a well-known judgment in the House of Lords, is, "has the settlor been his own conveyancer," "whether he has left it to the Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given you and to convert them into legal estates" <sup>(4)</sup>.

With regard to these two classes of trusts the important principle must be borne in mind that with regard to trusts executed technical words if employed are strictly interpreted in their legal and technical signification; but with regard to trusts executory the Court proceeds on a different principle, and does not consider itself bound to construe technical expressions with the same strictness. If, from the nature of the instrument, or from the circumstances of the case, a contrary intention of the creator of the trust can be ascertained, the Court will, in

<sup>(1)</sup> *Re Sands to Thompson*, 22 Ch. D. 614, 617.

<sup>(2)</sup> *Cunningham v. Foot*, 3 App. Cas. 974, 992.

<sup>(3)</sup> See *Cooke v. Smith*, 45 Ch. D. 38.

<sup>(4)</sup> *Egerton v. Earl Brownlow*, 4 H. L. C. 210.

supplying or directing the further act necessary for the execution of the trusts, mould the trusts according to such intention. The Court, in fact, in Lord Westbury's view, in construing an executory trust subordinates the language to the intention.

Executory  
trusts.

Executory trusts arise under marriage articles, *i.e.* the rough jottings or heads of the provisions to be formally embodied in a regular marriage settlement, and under wills. The principle upon which the Court proceeds in construing these two classes of instruments is, that in executory trusts under marriage articles, the intention of the parties may fairly be presumed *à priori* from the nature of the transaction: in executory trusts in wills, it must be gathered from the words of the will alone <sup>(1)</sup>.

The following forms of expression have been held sufficient to create "executory trusts in wills," viz. Instructions to trustees to settle property in moieties between two sons, and to take "special care in such settlement that it should never be in the power of either son to dock the entail of the estate given to him during his life" <sup>(2)</sup>. Directions that the heirs of the body or issue should take "in succession or priority of birth, or that the settlement should be made" as counsel should advise or "as executors should think fit" <sup>(3)</sup>, "to convey, assign, and assure to the use of my son J. F. and the heirs of his body lawfully issuing, in such manner and form and subject to such limitations and restrictions as that if J. F. should happen to die without lawful issue, then that the property might descend after his death unencumbered" <sup>(4)</sup>.

An implied trust may arise when property is given absolutely to any person accompanied by words of recommendation, entreaty, request, hope, or wish. Such a trust is called a precatory trust.

The law with regard to "precatory trusts" has been considerably modified by the decisions of the Courts in recent years.

The old rule was that where property was given to any person absolutely, and there were words of recommendation, confidence, hope, wish, or desire, in favour of other persons, a "precatory" trust would be created if three sets of circumstances concurred—

<sup>(1)</sup> Lewin on Trusts, 8th ed. p. 111, *et seq.*; White and Tudor's Leading Cases, Notes to *Glenorchy v. Bosville*, vol. i. p. 1; Smith's Principles of Equity, p. 43 *et seq.*; *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 543; *Miles v. Harford*, 12 Ch. D. 691; Brett's Leading Cases, p. 19 *et*

*seq.*; *In re Johnston. Cockerell v. Earl of Essex*, 26 Ch. D. 538.

<sup>(2)</sup> *Leonard v. Earl of Sussex*, 2 Vern. 526.

<sup>(3)</sup> *White v. Carter*, 2 Eden, 364; *Bastard v. Proby*, 2 Cox, 6.

<sup>(4)</sup> *Thompson v. Fisher*, L. R. 10 Eq. 207.

(1) If the words were so used, that upon the whole, they ought to be construed as imperative; Precatory trust..

(2) If the subject of the recommendation or wish was certain;

(3) If the objects or persons intended to have the benefit of the recommendation or wish were also certain.

It has, however, now been established by a series of decisions that in such cases no particular words can be relied upon as sufficient to create a trust, but in each case the question the Court has to consider is what was the intention of the testator <sup>(1)</sup>.

In one well-known case the late Lord Justice James said that in hearing case after case cited he could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of a family never meant to create trusts, must have been a very cruel kindness indeed <sup>(2)</sup>.

The current of decisions, as was said in a recent case, has changed, and beneficiaries are not to be made trustees unless intended to be so by the testator.

This statement may be illustrated by several recent decisions.

In one case, a testator gave all his real and personal estate to his wife absolutely, "with full power for her to dispose of the same as she might think fit for the benefit of his family, having full confidence that she would do so."

In another the property was left by the testator to his widow, "at her disposal in any way she might think best for the benefit of herself and family."

In a third, a man gave his widow "the whole of his real and personal property, feeling confident that she would act justly to their children, and divide the same whenever occasion required it of her."

And in a very recent case where a testatrix constituted a daughter universal legatee, and then proceeded in her will to state, "it is my desire that she allows A. G. an annuity of £25 during her life," the Court of Appeal held that there was an absolute gift to the daughter, and that there was no trust or duty imposed upon her to make the allowance <sup>(3)</sup>. One of the judges in delivering judgment, expressed himself as follows:—

<sup>(1)</sup> *Mussoorie Bank v. Raynor*, 7 App. Cas. 321.

<sup>(2)</sup> *Lambe v. Eames*, L. R. 6 Ch. App. 597.

<sup>(3)</sup> *Re Diggle*, 39 Ch. D. 253, and see *Stead v. Mellor*, 5 Ch. D. 225; *In*

*re Hutchinson and Tenant*, 8 Ch. D. 540; *In re Moore. Moore v. Roche*, 34 W. R. 343; *Adams and the Kensington Vestry*, 27 Ch. D. 314; and see Brett's Leading Cases, pp. 11, *et seq.*, where the cases are reviewed.

"Having regard to the later decisions, we must not extend the old cases, in any way, or rely upon the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will. A reasonable construction is to be given to the will; and, in my opinion, upon the reasonable construction of this will the testatrix cannot be held to have intended to give a binding direction" (1).

In all these cases the words of the will were regarded by the Court as mere expressions of the testators' hopes and wishes, but as creating no obligation whatever, and amounting to nothing more than absolute gifts of the properties in question.

Under the head of implied trusts fall all those trusts which are called resulting trusts. A resulting trust may be defined as one returning by implication for the benefit of the settlor or his representatives, either from the want of consideration or failure of the objects of the trusts, or the indefinite nature of or the want of trusts.

Resulting  
trusts.

Resulting trusts are subdivided by Mr. Lewin into two classes.

1. Where an owner being legally and equitably entitled, conveys, devises, or bequeaths the legal estate, and there is no ground to infer that he meant to dispose of the equitable interest.

2. Where a *purchaser* of property takes a conveyance of a legal estate in the name of a third person, and there is nothing to indicate that he does not intend to appropriate to himself the beneficial interest (2).

With regard to these cases the long established principle is that if there be a purchase of freehold, copyhold, or leasehold property, or of personal estate, whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several,

(1) Per Cotton, L.J., in *In re Diggles. Gregory v. Edmondson*, 39 Ch. D. 253.

(2) Lewin, 8th ed. p. 143. The doctrine of the law as to resulting trusts has found a place in one of Shakespear's sonnets, where the word "cause" is used for the modern phrase "consideration."

The cause of this fair gift in me is wanting,

Thyself thou gav'st, thy own worth then not knowing,

Or me, to whom thou gav'st it, else mistaking;

So thy great gift, upon misprision growing,

Comes home again, on better judgment making.—

*Sonnets* LXXXVII.

See also the "Merchant of Venice," Act iv. sc. 1, cited Lewin on Trusts, 8th ed., p. 13, where the word "use" is employed for trust.

whether jointly or *successive*, there is a resulting trust in favour of the man who advances the purchase money. It is, however, equally well established that in certain cases there is a presumption that the purchase was made by way of advancement or provision. The general principle on which the Court proceeds with regard to this subject was well summed up by Sir George Jessel, as follows:—<sup>(1)</sup>

“The doctrine of equity as regards presumption of gifts is this, that where one person stands in such a relation to another that there is an obligation on that person to make a provision for the other, and we find either a purchase or investment in the name of the other or in the joint names of the person and the other of an amount which would constitute a provision for the other, the presumption arises of an intention on the part of the person to discharge the obligation to the other, and therefore, in the absence of evidence to the contrary, that purchase or investment is held to be in itself evidence of a gift, in other words, the presumption of gift arises from the moral obligation to give.”

The presumption of advancement arises when the purchase is made in the name of a wife, or of a child, or of a person to whom the purchaser stands *in loco parentis*. Thus it was held to arise where the purchase was made in the name of an illegitimate grandchild, the father being dead, so too in the case of the nephew of a wife who had been adopted, but not in the case of an illegitimate grandson whose father was alive, nor of a deceased wife's sister who was living with the purchaser as his reputed wife, but not legally married. Evidence antecedent to or contemporaneous with or immediately after the purchase of matters forming part of the same transaction is admissible to show the purchaser's intention that the other party should only take the property as a trustee, and thus to rebut the presumption of advancement, but subsequent declarations are only admissible so far as they prove intention at the time of the purchase <sup>(2)</sup>.

The law with regard to the question whether resulting trusts arise, or do not arise, is well illustrated by a case decided by the Court of Appeal in 1885. In this case the plaintiff, a

Advancement.

<sup>(1)</sup> *Bennet v. Bennet*, 10 Ch. D. 474.

<sup>(2)</sup> See on this subject, *Ebrand v. Dancer*, 2 Ch. Cas. 26; *Beckford v. Beckford*, Loft. 490; *Drew v. Martin*, 2 H. & M. 130; *Currant v. Jago*, 1 Coll. 261; *Tucker v. Burrow*, 2 H. &

M. 515; *Soar v. Foster*, 4 K. & J. 152; *Batstone v. Salter*, L. R. 10 Ch. 431; and see cases reviewed: *Whitehouse v. Edwards*, 37 Ch. D. 683, and Brett's Leading Cases in Equity, p. 248, *et seq.*

Advance-  
ment.

widow, in the year 1880 caused £6,000 Consols to be transferred into the joint names of herself and the defendant, who was her godson. She did so with the express intention that the defendant, in the event of his surviving her, should have the Consols for his own benefit, but that she should have the dividends during her life, and she had been previously warned that if she made the transfer she could not revoke it. The first notice the defendant had of the transaction was a letter from the plaintiff's solicitor, about the end of 1882, claiming to have the fund retransferred to the plaintiff. The Court of Appeal decided that the legal title of the defendant as a joint tenant of the stock was complete, although he had not assented to the transfer until he was requested to join in retransferring the stock. Cotton, L.J., in delivering judgment said: "Though the defendant was the nephew of the first husband of the plaintiff, she was not *in loco parentis* to him, and the rule is well settled that where there is a transfer by a person into his own name jointly with that of a person who is not his child, or his adopted child, then there is *prima facie* a resulting trust for the transferor. But that is a presumption capable of being rebutted by showing that at the time the transferor intended a benefit to the transferee, and in the present case there is ample evidence that at the time of the transfer, and for some time previously, the plaintiff intended to confer a benefit by this transfer on her late husband's godson. In fact, when she desired to get the stock back again, what she said showed that she had originally intended to confer a benefit on the defendant Bowring, but that in consequence of something he had done which had displeased her she desired, if possible, to take back that which she had intended to be a benefit to him. That being so, the presumption that there would be a resulting trust for her is entirely rebutted" (1).

"No trust will suffice short of an absolute trust for herself." But it is impossible to impose such a trust on the defendant, when the evidence conclusively shows that she never intended to create any trust of the kind. Trusts are neither created nor implied by law to defeat the intention of donors or settlors: they are created or implied or held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied" (2).

The law with regard to devises and bequests on trusts not

(1) *Standing v. Bowring*, 31 Ch. D. (C.A.) 287.

(2) Per Lindley, L.J., *Standing v. Bowring*, 31 Ch. D. 289.



Devises  
and be-  
quests on  
trusts.

then declared was carefully considered in a case decided in 1884. In that case <sup>(1)</sup> a testator instructed his solicitor to prepare him a will leaving all his property to the solicitor himself absolutely, but to be held and disposed of by him according to written directions to be subsequently given. A will was accordingly prepared and executed, under which the solicitor was made universal legatee and sole executor. No directions were ever given to the solicitor by the testator in his lifetime, but after his death an unattested paper was found by which the testator stated his wish that a certain beneficiary should have all his property, except a small sum of money which he gave to the solicitor. The solicitor claimed no beneficial interest in the testator's property, except to the extent of his legacy, and claimed to hold the rest of the property as trustee for the beneficiary named in the paper. The Court decided that as the testator had not in his own lifetime communicated to the solicitor the object of the trust, no valid trust in favour of the person mentioned had been constituted, and, accordingly, that the solicitor held the property as trustee for the next of kin of the testator.

In this case the law on this important subject was summed up as follows: If it had been expressed on the face of the will that the defendant was a trustee, but the trusts were not thereby declared, it is quite clear that no trust afterwards declared by a paper not executed as a will could be binding. In such a case the legatee would be trustee for the next of kin.

There is another well-known class of cases where no trust appears on the face of the will, but the testator has been induced to make the will, or, having made it, has been induced not to revoke it by a promise on the part of the devisee or legatee to deal with the property, or some part of it, in a specified manner. In these cases the Court has compelled discovery and performance of the promise, treating it as a trust binding the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is to be presumed that if it had not been for such promise the testator would not have made or would have revoked the gift.

The essence of all these decisions is that the devisee or legatee accepts a particular trust which thereupon becomes binding upon him, and which it would be a fraud in him not to carry into effect. If the trust was not declared when the will was made, it is essential, in order to make it binding, that it should

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(1) *In re Boyes. Boyes v. Curritt*, 26 Ch. D. 531.

be communicated to the devisee or legatee in the testator's lifetime, and that he should accept that particular trust <sup>(1)</sup>.

Constructive trusts.

Constructive trusts arise in a great variety of instances. Thus, if a person who is only joint owner makes permanent improvements, a lien or trust may arise in his favour. Again, a constructive trust may arise under such circumstances as those considered in the celebrated case of *Ramsden v. Dyson* decided by the House of Lords.

If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, and will protect in the meantime the possession of the tenant <sup>(2)</sup>.

Again, when a valid contract for sale of real estate has been entered into the vendor becomes a constructive trustee of the property for the purchaser <sup>(3)</sup>, subject, however, to his paramount right to protect his own interest as vendor of the property <sup>(4)</sup>.

The most important class of cases, however, to which the doctrine of constructive trusts is applied, is that which concerns dealings by trustees or other persons in fiduciary relations with property which they hold in a fiduciary capacity.

"The principle," as it was said in a case in the House of Lords, "which forbids a trustee 'to traffic in his trust,' belongs to the jurisprudence of all nations. Indeed, it would

<sup>(1)</sup> *In re Boyes*. *Boyes v. Carritt*, 26 Ch. D. 531. In this case the judge remarks: It may possibly be that he would be bound if the trust had been put in writing and placed in his hands in a sealed envelope, and he had engaged that he would hold the property given to him by the will upon the trust so declared, although he did not know the actual terms of the trust.

<sup>(2)</sup> *Ramsden v. Dyson*, L. R. 1 H. L. 129; approved 9 App. Cas. 699. It must be borne in mind, however, as was said in this case, that if, on the other hand, a tenant being in

possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of Law or Equity can enforce.

<sup>(3)</sup> *Lysaght v. Edwards*, 2 Ch. D. 507.

<sup>(4)</sup> *Shaw v. Foster*, L. R. 5 H. L. 321, 338; *Beddington v. Atlee*, 35 Ch. D. 317, 324.

be a reproach to the law if it were powerless in such a case to prevent a trustee 'making commodity of his own wrong,' and holding property he had gained by a gross breach of duty" <sup>(1)</sup>. Where, therefore, any person in a fiduciary position makes a profit, equity will not allow him personally to retain it for his own benefit, but regards him as a constructive trustee for those beneficially entitled to the property. On this principle, where a trustee or executor renews a lease in his own name, the new lease is regarded as held upon trust for the benefit of the *cestui que trust*. This was the principle laid down in the celebrated case of *Keech v. Sandford*, decided by Lord Chancellor King more than a century and a half ago: In that case a trustee applied for a renewal of a lease for the benefit of an infant. The lease in question was of the profits of a market, and the lessor declined to grant a new lease on the ground that there could be no distress, and that the infant could not enter into any covenant with him. The Court considered, even though there was no fraud in the case, the lease must be considered "as a trust for the infant." "I very well see," said the Lord Chancellor, "if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*. This may seem hard, that the trustee is the only person of all mankind who might not have the lease, but it is very proper that the rule should be very strictly pursued, and not in the least relaxed, for it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew to *cestui que use*."

An executor <sup>(2)</sup> and an administrator <sup>(3)</sup> are in the same position.

So also a tenant for life renewing a lease in his own name <sup>(4)</sup> or purchasing the reversion <sup>(5)</sup> is held a trustee for those entitled in remainder. And the principle is also applicable to a partner renewing in his own name a lease of partnership premises, as in such a case he will be deemed a trustee for the firm, and to a renewal by one joint tenant; nor can an agent take the benefit of a renewal whilst he is acting for a person having a beneficial interest in the lease.

The result of the cases as to trustees and persons in fiduciary relations employing trust property, is summed up by Mr. Lewin, as follows <sup>(6)</sup> :—

<sup>(1)</sup> *Aberdeen Town Council v. Aberdeen University*, 2 App. Cas. 544, 557.

<sup>(2)</sup> *Pillgrem v. Pillgrem*, 18 Ch. D. 93.

<sup>(3)</sup> *Kelly v. Kelly*, 8 I. R. Eq. 403.

<sup>(4)</sup> *Mill v. Hill*, 3 H. L. C. 828.

<sup>(5)</sup> *Phillips v. Phillips*, 29 Ch. D. 673.

<sup>(6)</sup> Lewin on Trusts, 8th ed. 276.

“If a trustee or executor use the fund committed to his care in buying and selling land, or in stock speculations, or lay out the trust money in a commercial adventure, as in fitting out a vessel for a voyage; or put it into the trade of another person from which he is to derive certain stipulated gains, or employ it himself for the purposes of his own business or trade, in all these cases, while the executor or trustee is liable for all losses, he must account to the *cestui que trust* for all clear profits, and any difficulty that there may be in taking the account will be no bar to the interference of the Court.”

“What avails it,” asked Lord Brougham in a celebrated judgment, “towards preventing such malversations, that the contrivers of sordid injustice feel the power of the Court only where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores? It is in vain they are told of the Court’s arm being long enough to reach them, and strong enough to hold them, if they know that a certain delicacy of touch is required, without which the hand might as well be paralysed or shrunk up.” . . . “When did a Court of justice, whether administered according to the rules of equity or of law, ever listen to a wrong-doer’s argument to stay the arm of justice, grounded on the steps he himself had successfully taken to prevent his iniquity from being traced? Rather, let me ask, when did any wrong-doer ever yet possess the hardihood to plead, in aid of his escape from justice, the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying, You had better not make the attempt, for you will find that I have made the search very troublesome? The answer is, ‘The Court will try’”<sup>(1)</sup>.

Purchases  
by trus-  
tees.

The general principle upon which the Court proceeds with regard to purchases by trustees of trust property was admirably stated by Lord Eldon as follows: “Though it might be possible to see in a particular case that the trustee has not made advantage, it is wholly impossible to examine upon satisfactory evidence, in ninety-nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys an estate, and by the knowledge acquired in that character discovers a valuable coal mine under it, and, locking that up in his own breast, enters into a contract with his *cestui que trust*; if he chooses to deny it, how can the Court try that against his denial? The probability is that a trustee who has once con-

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<sup>(1)</sup> *Docker v. Somes*, 2 M. & K. 667, 674.

ceived such a purpose will never disclose it, and the *cestui que trust* will be effectually defrauded" (1).

A trustee *for sale*, i.e., a trustee who is selling, is absolutely and entirely disabled from purchasing the trust property from himself, that is, he cannot perform the two functions of seller and buyer; he cannot buy as agent for another; nor can another buy as agent for him. There is, however, no rule that a trustee, whether for sale or otherwise, may not purchase from his *cestui que trust*, but before any dealing with the *cestui que trust*, the relations between the trustee and *cestui que trust* must be actually or virtually dissolved (2).

#### DUTIES AND LIABILITIES OF TRUSTEES.

The duties and liabilities of trustees in respect of trust property may be next considered, and here it will be desirable for us to notice the distinction between a simple and a special trust (3). The *simple* trust is where the property is vested in one person *upon trust* for another, and the nature of the trust, not being prescribed by the settlor, is left to the construction of law. In this case the *cestui que trust* has *jus habendi*, or the right to be put into actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyance of the legal estate as the *cestui que trust* directs.

The *special* trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depositary of the estate, but is called upon to exert himself actively in the execution of the settlor's intention, as where a conveyance is to trustees upon trust to sell for payment of debts.

The general principle on which the Court proceeds, as settled by the House of Lords in two recent cases, is as follows:—

"As a general rule, the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trusts, and likewise to avoid all investments of that class

(1) *Ex parte Lacey*, 6 Ves. 625.

(2) Lewin on Trusts, 8th ed. p. 484.

(3) Lewin on Trusts, 8th ed. p. 18.

which are attended with hazard. "So long as he acts in the honest observance of these limitations, the general rule already stated will apply" <sup>(1)</sup>.

Thus much as to the general principles relating to trust property, but it must be borne in mind that the whole law as to duties, powers, and liabilities of trustees, and as to their powers of investment, has been most materially affected by two statutes passed in the years 1888 and 1889, which we shall now proceed to consider <sup>(2)</sup>.

Trustee  
Act, 1888.

The Trustee Act, 1888, now provides that no trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, subject to the three following provisions:—

(1) That it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere;

(2) That the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report;

(3) That the loan was made under the advice of such surveyor or valuer expressed in such report.

This section is to apply to a loan upon any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend.

The same section also provides that no trustee lending money upon the security of any leasehold property shall be chargeable with breach of trust only upon the ground that in making such loan he dispensed, either wholly or partially, with the production or investigation of the lessor's title.

<sup>(1)</sup> *Speight v. Gaunt*, 22 Ch. D. 727; 9 App. Cas. 1; *Learoyd v. Whiteley*, 12 App. Cas. 733.

<sup>(2)</sup> The alterations made by the Trustee Act, 1888, may be considered under four heads:—

I. Receipt of trust money by trustees through an agent.

II. Powers of sale, investment, &c.

III. Powers of dealing with trust property.

(a) Power to insure property;  
(b) To renew leaseholds.

IV. Liability for loss of trust estate.

(a) Statute of Limitations made applicable to trustees;

(b) Liability for depreciation reduced;

(c) Power to impound interest of beneficiary.

—Rudall on the Trustee Act, 1888.

No trustee shall be chargeable with breach of trust only upon the ground that, in effecting the purchase of any property, or in lending money upon the security of any property, he shall have accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

The section is to apply to transfers of existing securities as well as to new securities, and to investments made as well before as after the passing of the Act, December 24, 1888, except where some action or other proceeding shall be pending with reference thereto at the passing of the Act. <sup>(1)</sup>

Trustee  
Act, 1888.

The next section <sup>(2)</sup>, which applies to investments made as well before as after the passing of the Act (with an exception as to pending actions or other proceedings), provides that where a trustee shall have improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorised investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

A subsequent section <sup>(3)</sup> with reference to breaches of trust committed before as well as after the passing of the Act (with a similar exception as to pending actions or other proceedings) provides that where a trustee shall have committed a breach of trust at the instigation or request, or with the consent in writing of a beneficiary, the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the Court shall seem just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

The other sections of the Act contain a variety of provisions altering the duties, powers, and liabilities of trustees, which may here be briefly noticed, as they are considered in other portions of this work.

<sup>(1)</sup> See as to the law independent of this statute, which may still require to be considered: Lewin on Trusts, 8th ed. p. 306, *et seq.*; *In re Godfrey*, *Godfrey v. Faulkner*, 23 Ch. D. 483; *Smethurst v. Hastings*, 30 Ch. D. 490; *In re Whiteley*. *Whiteley v. Learoyd*,

33 Ch. D. 347; 12 App. Cas. 733; *In re Olive*. *Olive v. Westerman*, 34 Ch. D. 72; and see notes to *Speight v. Gunt*, Brett's Leading Cases in Equity.

<sup>(2)</sup> 51 & 52 Vict. c. 59, s. 5.

<sup>(3)</sup> 51 & 52 Vict. c. 59, s. 6.

Trustee  
Act, 1888.

The law is considerably altered as to receipt of money by a solicitor as agent for the trustee (*post*, p. 848); as to a trustee appointing a solicitor or banker his agent to receive and give a discharge for policy money (*ante*, p. 277); as to depreciatory conditions on sales by trustees (*ante*, p. 78); as to insurance of buildings by trustees (*ante*, p. 273); as to the defence of the Statute of Limitations in actions or proceedings against trustees or any person claiming through them, except in cases of fraud, &c. (*ante*, p. 205); as to investment on mortgages of long terms and renewable leaseholds.

It must be borne in mind that the interpretation clause provides that, for the purposes of the Act, the expression "trustee" shall be deemed to include an executor or administrator, and a trustee whose trust arises by "construction or implication of law," as well as an express trustee, but not the official trustee of charitable funds. The provisions of the Act relating to a trustee are also to apply as well to several joint trustees as to a sole trustee.

The Act applies to trusts created by instruments executed before as well as to trusts created after the passing of the Act, but there is a proviso, that "save as in the Act expressly provided, nothing therein contained shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust."

Trust In-  
vestment  
Act, 1889.

Let us now proceed to consider the trustee's powers of investment, and first of all attention must be directed to the Trust Investment Act, 1889, which received the Royal Assent on the 12th of August, 1889 <sup>(1)</sup>, and applies to all trusts created before as well as after the passing of the Act.

The 3rd section of this very important enactment provides that a trustee, unless expressly forbidden by the instrument (if any) creating the trust, may invest any trust funds in his hands in the following modes of investment, *viz.* :—

- (a.) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom :
- (b.) In real or heritable securities in Great Britain or Ireland :
- (c.) In the stock of the Bank of England or the Bank of Ireland :
- (d.) In India Three-and-a-half per Cent. Stock and India Three per Cent. Stock, or in any other capital stock

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(1) 52 & 53 Vict. c. 32.



which may at any time hereafter be issued by the Secretary of State in Council of India, under the authority of Act of Parliament, and charged on the revenues of India :

Trust Investment  
Act, 1889.

- (e.) In any securities the interest of which is or shall be guaranteed by Parliament :
- (f.) In consolidated stock created by the Metropolitan Board of Works, or which may at any time hereafter be created by the London County Council, or in debenture stock created by the receiver for the Metropolitan Police District :
- (g.) In the debenture or rentcharge or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock :
- (h.) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (g), either alone or jointly with any other railway company :
- (i.) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India :
- (j.) In the "B" Annuities of the Eastern Bengal, the East Indian, and the Scinde, Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway :
- (k.) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India :
- (l.) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by royal charter,

and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock :

- (m.) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough, having according to the returns of the last census prior to the date of investment a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or Provisional Order :
- (n.) In nominal or inscribed stock issued or to be issued by any Commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such Commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied :
- (o.) In any of the stocks, funds, or securities, for the time being authorised for the investment of cash under the control or subject to the order of the Court <sup>(1)</sup>.

<sup>(1)</sup> The effect of sub-s. (o) is to incorporate in this section the following additional investments authorised by rule 17 of Order xxii. R. S. C. 1883 (which may also be cited as Rules of the Supreme Court, Nov. 1888), which regulates the investment of cash under the control or subject to the order of the Court :—

1. Stocks of Colonial Governments guaranteed by the Imperial Government :

2. Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of investment. See Geare on Investment of Trust Funds, 2nd ed. p. 270.

Sects. 4 and 5 of the Act provide as follows with regard to the purchase of redeemable stocks at a price exceeding the redemption value, and the discretion of trustees in respect of investments :—

Sect. 4.—(1.) It shall be lawful for a trustee under the powers of this Act to invest in any of the stocks, funds, shares, or securities mentioned or referred to in s. 3 of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2.) Provided that it shall not be lawful for a trustee under the powers of this Act to purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (g), (i), (k), (l), and (m), which is liable to be redeemed *within fifteen years of the date of purchase* at par, or at some other fixed rate, or to purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate *at a price exceeding fifteen per centum* above par or such other fixed rate.

(3.) It shall be lawful for a trustee to retain until redemption any redeemable stock, fund, or security

Sect. 7 of the Trust Investment Act, 1889, also contains the following important provision with regard to investments of a sinking fund or loans fund by local authorities:—

“Where the council of any county or borough or any urban or rural sanitary authority are authorised or required to invest any money for the purpose of a loans fund or a sinking fund, any enactment relating to such investment shall be modified so far as to allow such money to be invested in any of the stocks, funds, shares or securities in which trustees are authorised by this Act to invest, except that such council or authority shall not by virtue of this section invest in any stocks, funds, shares or securities issued or created by themselves, nor in real or heritable securities.

“Provided that it shall not be lawful for any such council or authority to retain any securities which are liable to be redeemed at a fixed time at par or at any other fixed rate, and are at a price exceeding their redemption value, unless more than fifteen years will elapse before the time fixed for redemption.”

Since the passing of the Trust Investment Act, 1889, several cases have been decided upon its provisions. It has been held <sup>(1)</sup> that funds of a benefit building society are not within the Act, and accordingly cannot be invested in securities authorised by sect. 3. On the other hand, it has been held <sup>(2)</sup> that the funds of the Manchester Royal Infirmary were within the Act, and accordingly could be invested in the authorised securities, except where expressly forbidden by the trust instrument.

Where trustees have an option of investing in stock or in real securities and neglect to do either, they are only liable for the principal money and interest <sup>(3)</sup>.

The attention of the reader may here be directed to a certain class of trusts, the law with regard to which is of a somewhat

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which may have been purchased in accordance with the powers of this Act.

Sect. 5.—Every power conferred by this Act shall be exercised according to the direction of the trustee, but *subject to any consent* required by the instrument (if any) creating the trust with respect to the investment of the trust funds.

<sup>(1)</sup> *In re National Permanent Mutual Benefit Building Society*, 43 Ch. D. 431.

<sup>(2)</sup> *Re Manchester Royal Infirmary*, 43 Ch. D. 420. In this case it was also held that sect. 3 does not confer any fresh power to vary investments, but only extends any existing power to vary investments to the investments authorised by the Act. See also *Blue Ribbon, &c., Insurance Co.*, W. N. (1889) 176.

<sup>(3)</sup> *Robinson v. Robinson*, 2 De G. M. & G. 247; and see as to breach of trust, *Worman v. Worman*, 43 Ch. D. 296.

Trusts  
for benefit  
of creditors.

peculiar character, viz., trusts for the benefit of creditors, the law with regard to which, as settled by the celebrated case of *Garrard v. Lord Lauderdale* <sup>(1)</sup>, decided in the year 1831, was recently approved by the Court of Appeal in the case of *Johns v. James* <sup>(2)</sup>. The principle is that if real and personal estate be conveyed and assigned to trustees for the benefit of creditors, the transaction is regarded as a private arrangement for the convenience of the debtor, and no trust is considered to be created for the creditors. The transaction is treated as if a man had entrusted money to his servant to pay a debt, in which case he might revoke the mandate at any time before the money was paid over. The circumstances of the case, however, may render the transaction a trust.

"If the creditor," said James, L.J., "has executed the deed himself, and been a party to it, and assented to it—if he has entered into obligations upon the faith of the deed, of course that gives him a right, just as in the case where a man receives money from a person, or a direction from his creditor to pay some other person instead of paying him, and he communicates it to this person. The person to whom he communicates it has a legal right to have the money so applied, but that does not enure for the benefit of any other person or persons to whom no such communication has been made."

Effect of  
administra-  
tion judg-  
ment  
against  
trustees.

The general effect of judgment in an action against trustees for administration of the trust being given, is to "paralyse" their powers, and to prevent them from acting in any way in the administration without the sanction of the Court.

Thus the trustees cannot commence or defend any action or suit, or interfere in any other legal proceeding without first consulting the Court as to the propriety of so doing; a trustee for sale cannot sell; the committee of a lunatic cannot make repairs; an executor cannot pay debts, or deal with the assets for the purpose of investments. In many cases, however, the powers which are given to trustees are to be exercised "in their discretion" and "on their uncontrollable authority," as they in their uncontrolled and irresponsible discretion shall think fit, and the new and important principle established by the case of *Gisborne v. Gisborne* <sup>(3)</sup>, decided by the House of Lords in 1877,

<sup>(1)</sup> 3 Sim. 1; 2 Russ. & My. 451.

<sup>(2)</sup> 8 Ch. Div. 744, and see Brett's *Leading Cases in Equity*, p. 16: *Re Fitzgerald's Settlement*, 37 Ch. D. 18. See also *Cooke v. Smith*, 45 Ch. D. 38.

<sup>(3)</sup> 2 App. Cas. 300; *Minors v. Battison*, 1 Ap. Cas. 428; Lewin on

Trusts, pp. 597, 617, 8th ed.; and see *In re Weaver*, 21 Ch. Div. 615, for a case where the trustees were held to have only a limited discretion, and Brett's *Leading Cases in Equity*, pp. 111 to 117, where the authorities on this subject are reviewed.

is that in such cases the Court will not interfere with the trustees in exercise of their powers, unless a case of misconduct is made out against them.

"It is," said Sir George Jessel, "settled law, that when a testator has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly" <sup>(1)</sup>.

The 37th section of the Conveyancing Act (conferring upon trustees in certain cases the powers which a previous statute had conferred upon executors), provides that an executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorised to execute the trust and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

Provisions  
of the Con-  
veyancing  
Act, 1881.

The section applies to executorships and trusts, whenever created, but as regards trustees applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

"In future cases," said the late Sir George Jessel, "sect. 37 of the Conveyancing Act will have to be considered. It may have a revolutionary effect on this branch of the law. It looks as if the only question would be whether executors have acted in good faith or not" <sup>(2)</sup> and the observation would seem to apply equally to the case of trustees.

The Conveyancing Act, 1881, also provides with regard to trusts and executorships created after the 1st of January, 1882, that "where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust,

<sup>(1)</sup> *Tempest v. Lord Camoys*, 21 Ch. D. 571.

<sup>(2)</sup> *Re Owens. Jones v. Owens*, 47 L. T. (N.S.) 61.

the same may be exercised or performed by the survivor or survivors of them for the time being" <sup>(1)</sup>. Sect. 36 of the same Act confers upon trustees the fullest power of giving receipts for trust property <sup>(2)</sup>.

"Following" trust property.

An interesting and important question with regard to trust property is whether, if the trustee has disposed of it in any way, rightfully or wrongfully, and converted it into another shape, the *cestui que trust* is entitled to "follow" the property and regain his own.

The rule may be broadly stated in the form, that the *cestui que trust* is entitled to follow the trust property so long as the metamorphoses can be traced, *i.e.* so long as he can follow its changes and identify it <sup>(3)</sup>.

Whether the property has been rightfully or wrongfully disposed of, the beneficial owner may follow the proceeds, and if property has been purchased with it he is entitled either to take the property or have a charge upon it, as the case may be. The same principle applies when the trustee has, instead of investing the money, simply mixed it with money of his own.

"Supposing," said the late Sir George Jessel in a celebrated judgment, "the trust money was 1,000 sovereigns and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag, could anybody suppose that a judge in Equity would find any difficulty in saying that the *cestui que trust* has a right to take a thousand sovereigns out of that bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but this is the effect of it." The same principle would apply if the trustee, instead of putting the money into a bag, carried it to his bankers, lent it without security, lent it on a promissory note or on a bond. In these cases the *cestui que trust* would have a charge for the amount of the trust money, on the balance in the bank, on the promissory note, or on the bond <sup>(4)</sup>.

The right of the *cestui que trust* to follow trust property may, however, be defeated if the property has been transferred to a *bonâ fide* purchaser for value without notice. This may be illustrated by the celebrated case of *Thorndike v. Hunt*, where a man who was a trustee of two funds made good his breach of trust in respect of trust fund No. 1, by transferring into Court a portion

<sup>(1)</sup> 41 & 45 Vict. c. 41, s. 38.

<sup>(2)</sup> 41 & 45 Vict. c. 41, s. 36.

<sup>(3)</sup> Lewin on Trusts, 8th ed. 892;  
*In re Hallett. Knatchbull v. Hallett*,  
13 Ch. Div. 696; and see the cases

on this subject collected in Brett's  
Leading Cases in Equity, p. 2, *et seq.*  
See also *Lister & Co. v. Stubbs*, 45  
Ch. D. 1.

<sup>(4)</sup> *Re Hallett, ubi supra.*

of trust fund No. 2, and the Court decided that the *cestuis que trust* of the first fund were in the position of purchasers for value without notice and entitled to the money <sup>(1)</sup>.

Another case in which the right to follow the fund may be defeated is if the trust was for a fraudulent purpose, for in such a case the Court will decline to assist the *cestui que trust* <sup>(2)</sup>.

An important principle has been long established with reference to trust property which is made, as it is called, the subject of a series of limitations.

The principle, which is called the rule in *Howe v. Lord Dartmouth*, from a decision of Lord Eldon's in 1802, has been stated by the Court of Appeal in a recent case, as follows:—"That where personal estate is given in terms amounting to a general residuary bequest to be enjoyed by persons in succession, such persons are to enjoy the same thing in succession, and accordingly the Court effectuates the presumed intention of the testator by the conversion into investments approved by the Court of so much of the personalty as is at the death of the testator of a wasting or perishable or insecure nature, and also of reversionary interests."

Rule in  
*Howe v.*  
*Lord Dart-*  
*mouth.*

Where persons have been employed as agents for trustees, and have received and become chargeable with some part of the trust property, or have assisted, with knowledge, in a dishonest and fraudulent design on the part of the trustees, they are held liable by the Court as *constructive* trustees. The Court, however, will not hold persons liable merely because they have acted as agents for trustees in matters which the Court cannot approve. Thus, in the well-known case of *Barnes v. Addy* <sup>(3)</sup> the Court refused to hold the solicitors, who had acted for the trustees without knowledge of any fraudulent design, liable for breach of trust.

Liability  
as con-  
structive  
trustees.

The 25th section of the Judicature Act, 1873, provides that "no claim of a *cestui que trust* against his trustee for any property held on an *express* trust, or in respect of any breach of such trust, shall be held to be barred by any *Statute of Limitations*," and it has been decided that these words apply to personal as well as to real estate, and bar the effect of the Statute of Limitations in both cases <sup>(4)</sup>.

Limitation  
of actions  
against  
trustees.

The Real Property Limitation Act, 1874, however, contains a provision which appears at first sight to be somewhat incon-

<sup>(1)</sup> 3 De G. & J. 563; and see *Taylor v. Blakelock*, 32 Ch. Div. 560.

<sup>(2)</sup> *In re Great Berlin Steamboat Company*, 26 Ch. Div. 616.

<sup>(3)</sup> L. R. 9 Ch. 244; *Burstall v. Beyfus*, 26 Ch. Div. 35; *Stanier v.*

*Evans*, 34 Ch. D. 470 (where under the circumstances the solicitors were held liable); and see Brett's Leading Cases in Equity, p. 107, *et seq.*

<sup>(4)</sup> *Banner v. Berridge*, 18 Ch. D. 254.

Limitation  
of actions  
against  
trustees.

sistent with this enactment in the Judicature Act. It provides that after the commencement of that Act, 1st *January*, 1879, no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity and secured by an *express* trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears *except within the time within which the same would be recoverable if there were not any such trust*.

The explanation of this apparent inconsistency is that the provision of the Judicature Act applies between trustee and *cestui que trust*, and preserves, notwithstanding lapse of time, any *personal* remedy which the *cestui que trust* may possess. The provision of the Real Property Limitation Act, on the other hand, applies only to the land or rent charged, and bars the remedy by way of charges upon the property itself to which the *cestui que trust* might otherwise be entitled. (See, as to the provisions of the Trustee Act, 1888, s. 4, with reference to the Statute of Limitations, *ante*, p. 205.)

Appoint-  
ment of  
new  
trustees.

It is a fundamental principle that a trust is never allowed to fail through lack of a trustee; and the Court of Chancery always had jurisdiction *on bill filed* to appoint new trustees whenever a proper case could be shown. The jurisdiction is now exercised by the Chancery Division, the successor of the old Court of Chancery, and moreover the Court has a general power conferred upon it by the Trustee Act, 1850, and the Trustee Extension Act, 1852, whenever it is expedient to appoint new trustees and it shall be found *inexpedient, difficult, or impracticable* so to do, without the assistance of the Court, to appoint new trustees, either in substitution for, or in addition to, any existing trustee or trustees, and *whether there be any existing trustee or not* <sup>(1)</sup>. This statutory jurisdiction was formerly exercised on petition, but now on summons at chambers (*post*, p. 695).

Provisions  
of Con-  
veyancing  
Acts.

The cases in which it will be necessary or proper to apply to the Court for the appointment of new trustees are, since the Conveyancing Act, 1881, came into operation (1st January, 1882), comparatively rare.

Sect. 30 of that Act effects a radical change with regard to the devolution of trust and mortgage estates in cases of death occurring after the 31st December, 1881, and gets rid of many

(1) 13 & 14 Vict. c. 60, ss. 32, 34; 15 & 16 Vict. c. 55, s. 9.



difficult cases which arose under the previous law <sup>(1)</sup>. It provides that in all cases where trust or mortgaged property is vested in any person solely, the same shall, *notwithstanding any testamentary disposition*, devolve to and become vested in his personal representative from time to time in like manner as if the same were a chattel real vesting in them or him.

Provisions  
of Con-  
veyancing  
Acts.

Sect. 33 of the Conveyancing Act declares that every trustee appointed by the Court of Chancery, or the Chancery Division of the Court, or by any other Court of competent jurisdiction, shall, *even before the trust property is vested in him*, have the same power, authority, and discretion which he would have possessed had he been originally appointed a trustee.

Sect. 31 of the Act contains a very extensive power of appointing new trustees. It provides that where a trustee: (1) is dead; (2) remains out of the United Kingdom for more than twelve months; (3) desires to be discharged from the trust; (4) refuses to act; (5) is unfit to act; or, (6) is incapable of acting in the trusts, the person (if any) to whom the power is given by the settlement, or the surviving or continuing trustee for the time being, or the personal representative of the last surviving or continuing trustees or trustee for the time being, may appoint by writing another person or persons to be a trustee or trustees in his or their stead.

Sect. 5 of the Conveyancing Act, 1882, provides that "On appointment of new trustees a separate set of new trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property" <sup>(2)</sup>.

<sup>(1)</sup> See *In re Bell's Trusts*, 5 Ch. Div. 504; 30 L. T. Rep. (N. S.) 644; Clerke and Brett's Conveyancing Acts, 3rd ed. p. 133, where the various cases arising where the death has occurred upon or after the 7th August, 1874, unto the date when the Vendor and Purchaser Act came into operation, and before the 1st of January, 1882, will be found discussed and classified.

<sup>(2)</sup> See as to this section, *In re Paine's Trust*, 28 Ch. Div. 725; and *In re Hetherington's Trusts*, 34 Ch. Div. 211; *Saville v. Cooper*, 36 Ch. D. 520, where it was held that the section authorises the appointment of a separate set of trustees for a part of the trust property held on distinct trusts only when an appointment is being made of new trustees of the whole property, and does not enable the

existing trustees of the whole property to retire from the trusts as to part by means of an appointment of new trustees of that part. The provisions of the Conveyancing Act, 1881, with reference to the appointment, discharge, and retirement of trustees, are extended to trustees for the purposes of the Settled Land Acts (*ante*, p. 151).

An Act which is to be cited as the Trustees Appointment Act, 1890 (53 & 54 Vict. c. 19), also provides that the power for the appointment of new trustees conferred by the Conveyancing Act, 1881, or any other statutory power for the same purpose for the time being in force, shall apply to all land acquired and held in trust for any purpose to which 13 & 14 Vict. c. 28 (passed to render

Provisions  
of Con-  
veyancing  
Acts.

The same Act also conferred upon a trustee a new power, under certain circumstances, of retiring without having a successor appointed in his place. It provides that where there are *more than two trustees*, if one of them *by deed* declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, *by deed* consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom, without any new trustee being appointed in his place <sup>(1)</sup>.

A further novelty was also introduced by the Conveyancing Act, 1881, with regard to the transfer of the trust property to the new trustee by means of what is called a "vesting declaration." The Act provides that where a deed by which a new trustee is appointed to perform any trust contains a declaration by the *appointor* to the effect that any estate or interest in any land, subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, *without any conveyance or assignment*, operate to

more simple and effectual the titles by which congregations or societies for purposes of religious worship or education in England or Ireland hold property), 32 & 33 Vict. c. 26, and the present Act of 1890, apply.

This enactment is, however, subject to the important limitation that where there is a power to appoint as new trustees only such persons as may be qualified or nominated for election in some special manner, then those persons only who are qualified or nominated in that special manner shall be appointed trustees under the power for the purpose conferred by the Act.

The provisions of the Act of 1850 (13 & 14 Vict. c. 28) are also extended to "any land acquired by trustees in connexion with any society or body of persons comprising several congregations or other sections or divisions or component parts associated together for any religious purpose, when such land is held in trust for any of the following purposes, viz. :

- (1) A place for religious worship :
- (2) An endowment or provision for the maintenance of a place of religious worship, or the minister thereof, or provision for expenses connected therewith :
- (3) A burial-ground :
- (4) A place for education and training of students, whether for the ministry or for any other purpose :
- (5) A schoolhouse for a Sunday school, day school, or other school :
- (6) A residence for a minister or schoolmaster, or for the caretaker of a place of religious worship, or of a schoolhouse or a meeting-house, or offices or other buildings for or in connexion with religious or educational purposes.

<sup>(1)</sup> See Clerke and Brett's Conveyancing Acts, 3rd ed., p. 146, where attention is directed to the restrictions with which this power is guarded.

vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

Where a trustee retires under the power that we have previously noticed (*ante*, p. 535), the "vesting declaration" must be made by all the parties to the deed, *i.e.* by the retiring and continuing trustees, and by the other persons, if any, empowered to appoint trustees.

The legal estate in copyholds or customary lands (*ante*, p. 184), mortgages, and shares, &c., transferable in books kept by a company or other body, are, however, expressly excluded from the operation of a vesting declaration <sup>(1)</sup>.

The principal duty of the Court with regard to trusts is to see that they are properly executed, and as ancillary to this the Court has power to remove a trustee. The main principle on which the jurisdiction ought to be exercised is the welfare of the beneficiaries of the trust estate. Friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded <sup>(2)</sup>.

Removal of trustees.

#### CHARITIES.

The subject of Charities has already (Chapter XIX., Book I.), been to some extent considered in connection with real property, and it must now be briefly noticed in connection with the law relating to trusts, as by the express language of the Judicature Act (36 & 37 Vict. c. 66, s. 34), the execution of trusts charitable has been specially assigned to the Chancery Division.

Attention has already been directed (*ante*, p. 230) to the stringent provisions of the Mortmain and Charitable Uses Act, 1888, with regard to gifts of land for the benefit of charities. On the other hand, it must be borne in mind that charities are regarded with favour by the law, and accordingly gifts to them are held valid, which would have been void if made in favour of individuals. Gifts to charities receive a liberal construction.

Charities regarded with favour.

<sup>(1)</sup> Sect. 34; Sects. 1 and 2. See note to Clerk and Brett's Conveyancing Acts, 3rd ed., p. 148, *et seq.*

<sup>(2)</sup> *Letterstedt (now Vicomtesse Montmort) v. Broers and Another*, 9 App. Cas. 371, 389. See as to juris-

diction to appoint trustee: *Re Smirthwaite Trusts*, 21 Ch. D. 778; the donee of a power of appointment cannot appoint himself: *Re Skeat's Settlement*, 42 Ch. D. 522.

Thus, when there was a trust to such charitable institutions as the testator should by codicil appoint without name, and there was no codicil, it was held there was a clear charitable gift. And in a case in modern times, where there was a gift to charitable institutions to be chosen by the testator himself, by a subsequent codicil, and in default of such choice, then "to be distributed by his executors at their discretion," and there was no subsequent codicil, it was decided that a valid charitable trust was created. A gift to such charitable institutions as the testator shall by codicil appoint is, without more, a clear gift to charity, though no codicil is made <sup>(1)</sup>.

Doctrine of  
*cy-près*.

The doctrine of the Court in carrying into effect the charitable intention of a testator, although no definite purpose is named, or the purpose named is impracticable, is called the doctrine of *cy-près*, i.e., the trust is carried out as near as possible.

The principle on which the Court proceeds was stated by Lord Eldon as follows:—"If a testator has manifested a general intention to give to a charity, the failure of the particular mode in which the charity is to be executed shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished." The Court, in fact, treats charity in the abstract as the substance of the gift, and the particular disposition as the mode, so that in the eye of the Court the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy which never fails and cannot lapse <sup>(2)</sup>.

The principle of *cy-près* cannot be better illustrated than by an oft-quoted case which was decided nearly half a century ago. In this case there was a bequest of the residue of a testator's estate to a company to apply the interest of a moiety "unto the redemption of British slaves in Turkey or Barbary," one-fourth to charity schools in London and its suburbs, and one-fourth towards "necessitated decayed" freemen of the company. The will was dated 1723, but when the matter came before the

<sup>(1)</sup> *Mills v. Farmer* 1 Mer. 55; *Moggridge v. Thackwell*, 7 Ves. 86; *Pocock v. Attorney General*, 3 Ch. D. 342.

<sup>(2)</sup> *Moggridge v. Thackwell*, 7 Ves. 36, 69; *Mayor of Lyons v. Advocate General of Bengal*, 1 App. Cas. 91. This class of cases, which is characterised by Mr. Tyssen as very unsatisfactory, is thus described by

him: "When a testator has devoted property to some charitable or quasi-charitable purpose; but owing to some impediment either of law, or of the consent of some person or persons, or the default of some expected set of circumstances, the testator's object cannot be carried out in the manner pointed out by him."

Court more than a century after, there were no British subjects held in slavery in Turkey or Barbary, and the Court sanctioned a scheme under which the moiety of the testator's estate which had been thus undisposed of was given to the donees of the two other fourth parts <sup>(1)</sup>.

Doctrine of  
*cy-près*.

The doctrine of *cy-près* was much considered by the late Sir George Jessel in a case which came before him in the year 1881 <sup>(2)</sup>. There the question was with regard to the application of a considerable fund which had been left in the year 1629 for the benefit of the poor of Kensington, "As the trustees for the time being should think fit to establish for ever." At that time the then village of Kensington was a small village, about a mile and a half from Hyde Park Corner, and in old documents it is called a village, and the trusts were wholly unsuited to the ideas and wants of the present time. The Master of the Rolls in this case laid down the principle that the *cy-près* doctrine is applied to charitable gifts, when from lapse of time and change of circumstances it is no longer beneficial to carry out the intention of the donor in the exact mode which he has directed. In delivering judgment he expressed himself as follows: "Again, circumstances have changed in another way. The habits of society have changed, and not only men's ideas have changed, but men's practices have changed, and in consequence of the change of ideas there has been a change of legislation; laws have become obsolete, or have been absolutely repealed, and habits have become obsolete, and have fallen into disuse, which were prevalent at the times when these wills were made. The change, indeed, has become so great in the case that we are considering, that it is eminently a case for the application of the *cy-près* doctrine, if there is nothing to prevent its application."

It must be borne in mind that, as Mr. Jarman tells us, the Court does not take upon itself to frame schemes for the disposal of money for any other than charitable purposes. All moneys, therefore, not bequeathed in charity must have some definite object, and when a bequest is for charitable purposes, and also for indefinite purposes not charitable, and there are no apportionments in the will, the whole gift is void <sup>(3)</sup>.

As a general rule, where a fund given to a charity, either with or without the interposition of individual trustees, is in the

<sup>(1)</sup> *Attorney-General v. The Ironmongers' Co.*, 2 Beav. 313.

D. 310.

<sup>(2)</sup> Jarman on Wills, 4th ed. p. 214.

<sup>(3)</sup> *Re Campden Charities*, 18 Ch.

Doctrine of  
*cy-près*.

possession of the Court, it will not be paid out until a scheme is settled for its administration. Where, however, a fund is given to a corporation, or a treasurer, or officer of a charitable institution in England for a charitable purpose (unless upon different trusts from those of the general funds of the institution) the Court of Chancery will order it to be paid to the corporation, &c., without the settlement of a scheme <sup>(1)</sup>.

In connection with the doctrine of *cy-près*, in relation to gifts to charities, it will be desirable to notice the mode in which charitable trusts are executed. The result of the authorities is summed up in a standard work as follows <sup>(2)</sup>: "Where there is a general indefinite charitable purpose, not fixing itself upon any object, or if the object or means of carrying it out fail, the disposition is in the Queen by sign-manual; but where the execution is to be by a trustee, with some or general objects pointed out, the Court will take the administration of the trust." The application of charitable funds by sign-manual are now very rare, and the administration of the fund when a case for the application of the doctrine of *cy-près* arises is superintended by the Chancery Division, or by the Charity Commission, by means of what are called "schemes for the purpose of applying and managing the fund" <sup>(3)</sup>.

<sup>(1)</sup> Tudor's Charitable Trusts, p. 125, *et seq.*, and see *In re Lea*. *Lea v. Cooke*, 34 Ch. D. 528.

<sup>(2)</sup> Seton on Decrees, vol. i. p. 557; *Moggridge v. Thackwell*, 7 Ves. pp. 86, 123.

<sup>(3)</sup> The powers of the Court and of the Charity Commission in directing new schemes are limited by the doctrine of *cy-près*, and when a scheme is to be framed which falls outside it,

an event which rarely if ever happens (the doctrine of *cy-près* being now, since the decision in *Re Campden Charities*, 18 Ch. D. 310, so wide), the Legislature alone can interfere, and an Act of Parliament must be obtained. Mitcheson Charity Commission Acts, p. 66, and Tudor's Charitable Trusts, 3rd ed. pp. 133, 231, 562.

## CHAPTER II.

## CONVERSION.

Next after the subject of trusts, we may appropriately consider the equitable doctrine of conversion. The doctrine of conversion which was pronounced more than a century ago to be settled law, "established universally by the cases," is founded upon the equitable principle that when money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will consider that which is agreed to be, or which ought to be done, as done already, and will treat the property thus "notionally" converted as if the land were actually changed into money, or the money into land <sup>(1)</sup>.

Principle of  
conversion.

Money, said Sir Thomas Sewell, directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by will, by way of contract, marriage article, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land. The Court, in fact, as was stated in a very recent case by the Court of Appeal <sup>(2)</sup>, impresses upon the property that species of character for the purposes of devolution and title into which it is bound ultimately to be converted.

The doctrine of conversion cannot be better illustrated than by the famous case of *Ackroyd v. Smithson* <sup>(3)</sup>, celebrated for the argument of Lord Eldon, then John Scott. In that case a testator, after giving certain legacies, ordered his real and personal estate to be sold, his debts and legacies to be paid out of the proceeds, and the residue to be given to certain legatees. Two of the legatees died in the lifetime of the testator. The Court decided

*Ackroyd v.*  
*Smithson.*

<sup>(1)</sup> *Fletcher v. Ashburner*, 1 Bro. C. C. 500, decided in the year 1779.

<sup>(2)</sup> *Attorney-General v. Hubbuck*, 13 Q. B. Div. 275, at p. 289.

<sup>(3)</sup> *Ackroyd v. Smithson*, 1 Bro. C. C. 503. See Brett's Leading Cases in Equity, 198.

*Ackroyd v.  
Smithson.*

that the conversion directed by the testator was to be treated as a conversion only for the purposes of the will, and that all that was not wanted for these purposes must go to the persons who would have been entitled but for the will. The judgment accordingly was that the lapsed shares went, so far as they consisted of personal estate, to the next of kin, and so far as they consisted of real estate to the heir-at-law.

Difference  
between  
conversion  
by deed  
and by will.

A deed differs from a will in this material respect. The will speaks from the death, the deed from delivery. If, then, the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate *from the delivery of the deed*, and, consequently, at the time of his death. The deed, thus altering the actual character of the property, is, so to speak, equivalent to a gift of the expectancy of the heir-at-law to the personal estate of the author of the deed. The principle is the same in the case of a deed as in the case of a will; but the application is different, by reason that the deed *converts the property in the lifetime of the author of the deed*, whereas in the case of a will, the conversion does not take place until the death of the testator. It is not a question of actual physical conversion of the property from real estate into personal property, but whatever be the time at which that conversion is directed to take place, whether in the grantor's lifetime, or after his death, the grantor, by executing a deed of this description, says in effect: "From the time I put my hand to this deed, I limit so much of this property to myself as personal property" <sup>(1)</sup>.

An interesting case on the doctrine of conversion came before the House of Lords in 1887.

The accumulations of the personal estate of a lunatic were invested in the purchase of land by his committees, under the orders of the Lords Justices. By the conveyances made in pursuance of the orders, the lands were conveyed to the use of the committees, *their heirs and assigns*, upon trust for the lunatic, *his executors, administrators and assigns*, either until the inquisition as regarded his soundness of mind should be superseded, or until his death, whichever should first happen, and until such time the committees had certain powers of leasing, selling or exchanging. Each conveyance also contained a declaration that the premises were to all intents and purposes to be considered as part of the personal estate of the lunatic, but there was no

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<sup>(1)</sup> *Clarke v. Franklin*, 4 K. & J. 257, quoting judgment in *Griffiths v. Ricketts*, 7 Hare, 299.



trust for sale. Upon the death of the lunatic the Crown claimed probate duty on the value of the investment in land.

Illustration of conversion.

The House of Lords decided (reversing the decision of the Court of Appeal) that the value of the lands was part of the personal estate of the lunatic at his death, and liable to probate duty <sup>(1)</sup>. The effect of the provision they said was to *stamp upon the property from the beginning the character of personalty*, and accordingly all the incidents of personal property attached to it.

The Lunacy Act, 1890, contains the following enactment with regard to the conversion of a lunatic's property :—

“(1) The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any monies arising from any sale, mortgage, or other disposition under the powers of the Act, which may not have been applied under such powers as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of.

“(2) Moneys received for equality of partition or exchange, or under any lease of unopened mines, and all fines, premiums, and sums of money received upon the grant or renewal of a lease where the property the subject of the partition, exchange, or lease was real estate of the lunatic, shall, subject to the application thereof for any purposes of the Act, as between the representatives of the real and personal estate of the lunatic, be considered as real estate, except in the case of fines, premiums, and sums of money received upon the grant or renewal of leases of property of which the lunatic was tenant for life, in which case the fines, premiums, and sums of money shall be personal estate of the lunatic” <sup>(2)</sup>.

The doctrine may be further illustrated by a case which involved the question whether probate of a will was to be granted. Freehold property had been settled on the marriage of a lady upon trust that the trustees should sell it, and stand possessed of the proceeds in trust for such purpose as she should by will appoint. The settlement contained a power for the trustees to postpone the sale and then contained the following provision :—“Notwithstanding any postponement of the sale of

<sup>(1)</sup> *Attorney-General v. Marquis of Ailesbury*, 12 App. Cas. 672; 36 W. R. 737.

<sup>(2)</sup> 53 Vict. c. 5, s. 123; and see as to the doctrine of conversion in re-

spect of lunatics' property, Pope's *Law and Practice of Lunacy*, 2nd ed. by Boome and Fowke, 161, 167, 168, 362, *et seq.*

the said freehold premises, or any part thereof, the same premises shall, for the purposes of enjoyment and transmission, be considered as converted in equity, but without prejudice to the right of the person or persons becoming absolutely entitled to the entire produce thereof to treat the same as unconverted, and require a conveyance thereof."

The question was whether probate could be granted of the will, and whether probate duty was payable in respect of it. Sir James Hannen decided this in the affirmative:—"Where freehold property (he said) has had impressed upon it a changed character by reason of the doctrine of equitable conversion, it is to be treated as personalty, and probate duty is payable, and it therefore follows that probate must be granted" <sup>(1)</sup>.

And the learned judge, after noticing that Lord Penzance had, in a case decided before the Judicature Act came into operation, altogether refused to recognise the doctrine of equitable conversion in cases in the Probate Court, proceeded as follows:—"I should, of course, have felt myself bound to act upon any decision of Lord Penzance if I thought it completely covered the ground here. But it appears to me that a very great change has been worked now by the fusion of all the Courts into one. There is no difference between the law to be administered in this Division and elsewhere, but each Court is to ascertain what the law is: whether legal or equitable, and I think, therefore, it is open to me to establish a different basis to that which existed in the Probate Court. I am of opinion that where freehold property has had impressed upon it a changed character by reason of the doctrine of equitable conversion, it is to be treated as personalty, and probate duty is payable, and it therefore follows that probate must be granted."

Conversion  
of partner-  
ship prop-  
erty.

A very remarkable instance of the doctrine of conversion is that which arises in the case of partnership property. This doctrine has now been made part of the Statute Law by the Partnership Act, 1890, the provisions of which shall be presently noticed. The reason of the rule was stated in an oft-quoted case, as follows:—"The principle is well established that if partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property, that transaction makes the property personalty, and effects a conversion out and out. What is the clear principle of this Court as to the law of partnership? It is that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the

<sup>(1)</sup> *In the Goods of Ann Gunn*, 9 P. D. 242.

proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule, and it requires no special stipulation; it is inherent in the very contract of partnership" (1).

With regard to this subject, it is now enacted by the Partnership Act, 1890: "Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors and administrators, as personal or moveable and not real or heritable estate" (2).

It has been established by a series of cases that when a conversion is rightly made, either by the Court or a trustee, all the consequences of conversion must follow unless there be an equity in favour of reconversion. Accordingly, when land is directed to be turned into money, the property will be treated as money for all purposes unless there be some equity to reconvert it again into land (3).

Side by side with the doctrine of conversion comes the doctrine of "reconversion," by which the effect of the previous notional conversion is undone, and the real or personal estate which had been deemed to be converted is considered to be reconverted with its original character. The principle on which the Court proceeds has been well stated as follows:—

Reconversion.

"Whenever real estate has been converted into personalty, or, according to the doctrine of a Court of Equity, is to be treated as having been converted into personalty, it must then descend as personalty, unless some person who is absolutely entitled to it has shewn in some way that he has elected to take it as real estate. Almost anything will be enough to shew such an intention, but there must be something" (4).

Suppose a sum of money is directed to be laid out in the

(1) *Darby v. Darby*, 3 Drew. 495, cited with approval, *Attorney-General v. Hubbuck*, 10 Q. B. D. 488; 13 Q. B. D. 275.

(2) 53 & 54 Vict. c. 39, s. 22. See as to the law, independent of this enactment, Lindley on Partnership, 5th ed. p. 343, where the authorities are collected.

(3) *Steed v. Preece*, L. R. 18 Eq. 192; *Arnold v. Dixon*, L. R. 19 Eq. 113; *Hyett v. Meakin*, 25 Ch. D.

735; and see Brett's Leading Cases in Equity, p. 197 *et seq.*, where the cases are reviewed, and see on the subject of conversion: *Re Hotchkys. Freke v. Culmady*, 32 Ch. D. 408; *Re Thomas. Thomas v. Howell*, 34 Ch. D. 166; *Re Harrison. Parry v. Spencer*, 34 Ch. D. 214; *Re Heathcote. Gilbert v. Aviolet*, W. N. 1887, 217.

(4) *In re Lewis. Foxwell v. Lewis*, 30 Ch. D. 654, 656.

purchase of land, one undivided moiety of which is devised to A., and the other undivided moiety of which is devised to B. It has been decided that either A or B. may elect to take his share as money. If, however, the direction is that certain land should be sold, and the money divided between the two persons, neither of the parties can elect to take half the land <sup>(1)</sup>. The principle upon which the law proceeds is, that if this were allowed, the interest of the party entitled to the other moiety would be to some extent sacrificed, as it is probable that half of an estate could not be sold on as advantageous terms as if the entire estate were sold together.

A striking illustration of conversion by Act of Parliament is afforded by the case of *Frewen v. Frewen* <sup>(2)</sup>. A testator had devised an advowson. The Irish Church Act abolished advowsons and gave in lieu thereof pecuniary compensation. The Court of Appeal decided that the advowson was converted into personal estate.

Lord Justice James, in delivering judgment, said: "The Act of Parliament destroyed the advowson, that is to say, it converted that which was an advowson with a perpetual right of presentation to a living in the Established Church into something different. The property, which was vested in the testator at the time when the Act was passed, had its character permanently changed and practically destroyed. The same case arises when land is taken from a man who cannot help himself, when, though the money may not be paid till some time afterwards, still the land becomes personal estate" <sup>(3)</sup>.

Where money is paid into Court in respect of land taken under the Lands Clauses Consolidation Act, 1845 (see *post*, p. 690), the land is regarded as converted into money if the parties are competent to convey; but if the parties are under disability there is no conversion. The principle upon which the Court proceeds is, that in the former case there is contract, and therefore conversion, but that in the latter case, *i.e.* where the parties are under disability, there is no contract and therefore no conversion. Mere notice to treat does not affect a conversion, but as soon as the price is fixed there is a binding contract and the land is treated as converted into money <sup>(4)</sup>.

<sup>(1)</sup> *Seeley v. Jago*, 1 P. Wms. 389; *Holloway v. Radcliffe*, 23 Beav. 163.

<sup>(2)</sup> L. R. 10 Ch. 610.

<sup>(3)</sup> *Frewen v. Frewen*, L. R. 10 Ch. 610.

<sup>(4)</sup> *In re Harrop*, 3 Drew. 726; *Kelland v. Fulford*, 6 Ch. D. 491;

*Haynes v. Haynes*, 1 Dr. & Sm. 426; *Ex parte Hawkins*, 13 Sim. 569; *In re Piggott and the Great Western Railway Company* 18 Ch. D. 146; and see Fry on Specific Performance, 2nd ed. p. 49, *et seq.*

## CHAPTER III.

## ADMINISTRATION.

The principle on which the jurisdiction of the Court in respect of administration is based, has been well stated as follows <sup>(1)</sup>: It is founded on the right, recognised from the earliest times by the Court of Chancery, of any person who may have, either alone or along with others, a claim against a particular property, or the holder of a particular property to have a discovery and account of the property liable to meet his demand, and then to have such property, when so discovered, secured until the validity of his own and the other demands upon it is tried and ascertained, and if they are established, then to have them satisfied thereout in a just and regular course.

Principle on which administration is based.

Proceedings for the administration of the estate of a deceased person, either general or partial, may, generally speaking, be commenced by any of three classes of persons.

Commencement of proceedings.

(1) Creditors, whether simple contract creditors, or specialty creditors; *or*

(2) The persons beneficially interested in the estate, *e.g.* the legatee, or one of the next of kin in the case of personalty, the heir or devisee in the case of real estate; *or*

(3) The executor, administrator, or trustee (see *post*, p. 784).

A fact, however, which must not be lost sight of in considering the subject of administration, is that in scarcely any portion of the law have greater changes been introduced alike in principle and in practice than in that which concerns the administration of the estates of deceased persons. Allusion has already (*ante*, p. 46) been made to this subject in connection with the liability of the fee simple estate to be applied in payment of the debts of its deceased owner. The old law, as was well said, permitted and almost encouraged dead men to sin in their graves, and the creditor at one time could only recover payment of his just demands by the bounty of his debtor. Now the law has been gradually altered until finally by two

<sup>(1)</sup> Williams on Executors, 8th ed. p. 2013; Haddan on Administration, *ad init.*

Changes in the law. enactments the distinction between simple contract and specialty debts has been abolished, and in the administration of insolvent estates the principles of the bankruptcy law have been introduced in certain cases (*infra*). A most important change has also been introduced into the practice of the Courts with regard to administration. Formerly a decree for an administration was a matter of course, but now the Judicature Rules provide that it shall not be obligatory on the Court or a judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust, or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order. The practical effect of this rule is that an order for "general administration" is now but seldom granted (see *post*, p. 785).

Let us now consider the mode in which the property of a deceased person is to be applied in satisfaction of his liabilities.

It must be borne in mind that not only may the property of a deceased person consist of a great many different descriptions of property, but the debts and liabilities attaching to it may also be of different characters, *e.g.* the debts may be by specialty or by simple contract.

Attention may first be directed to the recent statutes which made most important changes in the law of administration with regard to the different classes of debts which are to be paid.

Hinde  
Palmer's  
Act.

A statute known as Hinde Palmer's Act (32 & 33 Vict. c. 46), provides that "in the administration of the estate of every person who shall *die on or after the 1st day of January, 1870*, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or personal, any statute or other law to the contrary notwithstanding; provided also, that this Act shall not prejudice or affect any lien or charge, or other security which any creditor may hold or be entitled to for the payment of his debt."

Judicature  
Act, 1875,  
s. 10.

The 10th section of the Judicature Act, 1875, contains the following provision with regard to the administration of the estates of persons who died insolvent:—"In the administration by the Court of the assets of any person who may die after the

commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt (1).

Subject to the provisions of the three Acts, 17 & 18 Vict. c. 113 (Locke King's Act) and the Amending Acts (*post*, p. 550, *et seq.*), the general effect of which is to throw mortgage charges and liens for unpaid purchase-money on real estate of whatever tenure, the assets (2) of a deceased person are applied for the payment of his debts in the following order:—

Order of  
adminis-  
tration.

1. The general personal estate unless expressly or by implication exempted. The first charge on the personal property of a deceased person is that for the funeral expenses. Next come the expenses of proving the will, or taking out administration (3).

2. Lands expressly devised for the purpose of paying debts.

3. Estates which descend to the heir.

4. Real or personal property devised or bequeathed *charged with debts*.

5. General pecuniary legacies which contribute rateably to the payment of debts, or as it is technically phrased, *pro rata*.

6. Specific legacies and real estate devised, whether in terms specific or residuary, which are also liable to contribute rateably to the payment of debts.

7. Real and personal property which the testator has power to appoint, *and which he has appointed* by his will or by voluntary deed.

8. Widows' *paraphernalia* (*ante*, p. 226).

9. Land in a foreign country which is governed by the *lex loci rei sitæ* (see *ante*, p. 7), and therefore not liable for any debts which the law of the foreign country would not cast upon it (4).

(1) See *Re D'Epineuil*, 20 Ch. D. 217; *Pratt v. Inman*, 43 Ch. D. 175; *Re Hargreaves*, 44 Ch. D. 236; *Re Baker*, 44 Ch. D. 262.

(2) The term "assets" is derived from the French, *assez*, the right of the creditor originally depending on the sufficiency of the estate.

(3) See as to testamentary expenses including costs of an administration action: *Miles v. Harrison*, L. R. 9 Ch. 316; *Harloe v. Harloe*, 20 Eq. 471.

(4) See further, on this subject, *Jarman on Wills*, 4th ed. vol. ii. p. 622, and *Theobald on Wills*, 3rd ed. p. 570; and see *Lancefield v. Iggulden*, L. R. 10 Ch. 136; *Tomkins v. Colthurst*, 1 Ch. D. 626; *Farquharson v. Floyer*, 3 Ch. D. 109 (where the previous decisions are collected; and *Hensman v. Fryer*, L. R. 3 Ch. 420, is not followed); *Trott v. Buchanan*, 28 Ch. D. 446.

This somewhat complicated enumeration becomes comparatively easy of remembrance when the reasons on which the law is based are understood.

Order of  
adminis-  
tration.

The order in which the various portions of a testator's estate are applied for the payment of his debts, as is pointed out by the late Mr. Joshua Williams<sup>(1)</sup>, has been established out of regard to the testator's intention. The "general personal estate" which, as we have seen, comes first in the order was long the only fund to which those creditors who had not specialties binding the heir could resort; cash, stock, and movables come first to hand, are most readily applicable, and are the funds out of which people in their lifetime usually pay their debts. The general personal estate accordingly, in the absence of any express direction to the contrary, is held primarily liable to the payment of the debts of the deceased. Next after that would naturally come any special fund set apart by the testator. The heir not being a beneficiary within the testator's intention, lands descended to him would properly follow next in order of application. Property expressly charged with the payment of debts would, of course, be applicable before legacies bequeathed, or property specifically given. Property over which the testator may have exercised a *general* power of appointment is, in favour of creditors, considered as supplementarily applicable after the whole of his own property shall have been exhausted. The widows' *paraphernalia* are, however, by a slight gallantry of the law, not sacrificed until even the appointed property has been exhausted.

The last place is filled by lands in a foreign country, a remote case illustrating the important principle which was stated in p. 7 of this work<sup>(2)</sup>.

The general law as to when personal estate is or is not liable for payment of debts was stated with great clearness in a judgment of the House of Lords as follows:—

The general rule of law as to pecuniary legacies (in the absence of any sufficient indication of a contrary intention) is,

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(1) Williams on Real Assets. Some modifications have been introduced into Mr. Williams' statement, rendered necessary by the decisions noticed, *ante*, p. 548, note.

(2) The distinction between legal and equitable assets which was formerly of great importance, is now practically obsolete, as it only applies to the administration of the

estates of persons who died before 1st of January, 1870. This distinction was based on the remedy of *the creditor, &c., not the nature of the property*. The real test being, whether or not the property came to the executor *virtute officii*, as if it did it formed "legal assets"; if not it was "equitable assets."



that they are payable by the legal personal representatives of the testator (in whom the whole personal estate rests by law) out of the personal estate not specifically bequeathed. The presumption is that the testator intends them to be so paid. Unless charged upon it by the will, they are not payable out of the real estate.

The principle of the exemption of personal estate specifically bequeathed is, that it is necessary to give effect to the intention apparent by the gift. If the bequest is of a particular chattel, such as a horse or a ship, it is manifest that the testator intended the thing itself to pass unconditionally and *in statu quo* to the legatee, which could not be if it were subject to the payment of general and testamentary expenses, debts, and pecuniary legacies. As against creditors the testator cannot wholly release it from liability for his debts, but as against all persons taking benefits under his will he may. The same principle applies to everything which a testator, identifying it by a sufficient description and manifesting an intention that it should be enjoyed or taken in the state or condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate, the fund out of which pecuniary legacies are in the ordinary course payable <sup>(1)</sup>.

Specific bequests.

It will now be necessary for us to consider the important changes to which we have previously alluded, as made by Locke King's Act and the Amending Acts.

Prior to the passing of the statute 17 & 18 Vict. c. 113, known as Locke King's Act, which applies only to cases where testators or intestates die after the 1st of January, 1855, the general rule was, that an heir-at-law or devisee to whom real estate subject to a mortgage or charge descended or was devised, was entitled to have the mortgage or charge paid out of the general personal estate <sup>(2)</sup>.

Locke King's Act.

That important statute provided "that where any person shall after the thirty-first day of December one thousand eight hundred and fifty-four die seised of or entitled to any estate or interest in any land or other hereditaments, which should at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person *should not by his will or deed or other document have signified any contrary or other intention*, the heir or devisee to whom such land or here-

<sup>(1)</sup> *Robertson v. Broadbent*, 8 App. Cas. 812, 815. See *Re Bate*, 43 Ch. D. 600, as to apportionment where personal estate insufficient; *Re Harrison*

43 Ch. D. 55.

<sup>(2)</sup> See as to the exceptional cases under the old law, *Jarman on Wills*, vol. ii. 4th ed. p. 634, *et seq.*

Locke  
King's Act.

ditaments should descend or be devised should not be entitled to have the mortgaged debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged should as between the different persons claiming through or under the deceased person be primarily liable to the payment of all mortgaged debts with which the same should be charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof."

The Act then went on to provide that nothing therein contained should "affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise. Provided also that nothing therein contained should affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January one thousand eight hundred and fifty-five."

30 & 31  
Vict. c. 69.

This Act was followed by Locke King's Amendment Act (30 & 31 Vict. c. 69), which, as Sir George Jessel said, was an explaining and construing Act, which "politely overruled" the previous decisions of the Court and provided that in construing wills of persons dying after the 31st of December, 1867:

- (1) A general direction that the debts or that all the debts of the testator should be paid out of his personal estate, should not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate; and
- (2) that in the construction of both Acts (i.e. 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69) the word "mortgage" should be deemed to extend to any *lien for unpaid purchase-money* upon any lands or hereditaments purchased by a testator.

40 & 41  
Vict. c. 34.

Two omissions in the Act of 1867, which were made the subject of judicial decision, viz. that it had no application to cases of intestacy or to leaseholds for years, were supplied by 40 & 41 Vict. c. 34<sup>(1)</sup>, which applies to the cases of all testators

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<sup>(1)</sup> *Harding v. Harding*, L. R. 13 Eq. 493; *Solomon v. Solomon*, 12 W. R. 540; *Re Wormsley*, 4 Ch. D. 665.

and intestates dying after the 31st of December, 1877. This Act extends the application of the two former Acts, and provides that these two Acts should as to any *testator or intestate* dying after the thirty-first of December, one thousand eight hundred and seventy-seven, be held to extend to a testator or intestate dying seised or possessed of or entitled to *any land or other hereditaments of whatever tenure* which should at the time of his death be charged with the payment of any sum or sums of money by way of mortgage or any other equitable charge, *including any lien* for unpaid purchase-money, and the devisee or legatee or heir should not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he should within the meaning of the said Acts have signified a contrary intention; and such contrary intention should not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate <sup>(1)</sup>.

Attention may here be directed to the rights of retainer, and preference possessed by executors and administrators.

Retainer  
and prefer-  
ence.

An executor or administrator may pay even a simple contract creditor in preference to a specialty creditor <sup>(2)</sup>, and he may pay debts though statute barred. He has also a right of retainer, *i.e.* a right to retain part of the estate in satisfaction of a debt due to himself, but only as against creditors of equal degree with himself <sup>(3)</sup>.

In connection with the subject of administration, the doctrine of "marshalling" may also be briefly noticed. The principle of the Court here is, that a creditor who has a right to resort to two funds shall not by his choice disappoint another who has one only <sup>(4)</sup>. It must, however, be borne in mind that this doctrine is now of considerably less importance than it was in the old days when real estate was not in the absence of an express charge liable for simple contract debts (see *ante*, p. 46).

Marshall-  
ing.

With regard to charities, the rule is that the Court will not

(1) See *In re Rossiter*. *Rossiter v. Rossiter*, 13 Ch. D. 355; *In re Cockcroft*. *Broadbent v. Groves*, 24 Ch. D. 94; *In re Smith*. *Hannington v. True*. *Giles v. True*, 33 Ch. D. 195; Brett's Leading Cases in Equity, p. 218.

(2) *Re Ormond*, 58 L. T. 24; and see *Re Rowson*, 29 Ch. D. 358, and notes thereto; Brett's Leading Cases

in Equity, p. 156, *et seq.* This right is lost by judgment or administration, and see *Re Harris*, 35 W. R. 710.

(3) *Re Jones*, 31 Ch. D. 440. A creditor administrator is prevented by his bond from preferring himself. See further, Indermaur's Manual of Equity, 2nd ed. p. 81, *et seq.*

(4) *Trimmer v. Bayne*, 9 Ves. 209.

marshal assets in favour of a charity by throwing the debts and ordinary legacies upon the proceeds of the real estate and the personalty savouring of realty, in order to leave the pure personalty for the charity. But if the testator gives a direction to marshal, the Court will carry it into effect <sup>(1)</sup>.

The rule of the Court in such cases is to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of it to fail as would in that way be payable out of the prohibited fund.

See as to practice in administration, *post*, pp. 708, 784, *et seq.*

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<sup>(1)</sup> *Mogg v. Hodges*, 2 Ves. 52, and the doctrine of marshalling, notes to see *Tysen's Law of Charitable Webb v. Smith*, Brett's Leading Cases Trusts, p. 485, *et seq.* See also as to in Equity, p. 222.

## CHAPTER IV.

## PARTITION (1).

The law as to partition is now almost wholly governed by the Partition Acts, 1868 (31 & 32 Vict. c. 40), and 1876 (39 & 40 Vict. c. 17). Partition Acts.

Prior to the passing of the first of these Acts partition was regarded as a matter of right, and could be insisted upon, no matter how inconvenient or even ruinous the consequences might be to the other party. This sometimes led to very absurd results. In one case the partition of a house was carried into effect by building up a wall in the middle, and in another the defendant in vain objected on the ground that the commissioners had allotted to the plaintiff the whole stack of chimneys, all the fire-places, the only staircase, and all the conveniences in the yard. Now a very extensive jurisdiction has been given by the Partition Acts with regard to ordering a sale of property which is made the subject of a partition action (2).

Sect. 3 of the Partition Act, 1868, gives the Court power in a suit (now action) for partition where, if the Act had not been passed, a decree for partition might have been made, to direct a sale and distribution of the proceeds (with all necessary or proper consequential directions) instead of a partition *at the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them*, if the Court is satisfied that a sale and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property by reason of either: Power to order sale under Partition Act, 1868.

(1) The nature of the property to which the suit relates ;  
or

(1) All causes and matters for the partition or sale of real estates are assigned to the Chancery Division of the High Court of Justice by the 34th section of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66). Jurisdiction to partition copyholds was conferred by 4 & 5 Vict. c. 35, amended by 21 & 22 Vict. c. 34.

(2) In *Griffies v. Griffies*, 11 W. R. 943, where the principle was laid down that where one tenant in common refused to consent to a sale he could insist on partition, if he thought proper, although the costs would probably swallow up the whole property; and see further in Brett's *Leading Cases in Equity*, p. 46.

Power to  
order sale  
under  
Partition  
Act, 1868.

(2) The number of the parties interested or presumptively interested therein ; or

(3) The absence or disability of some of the parties interested ;  
or

(4) Of any other circumstance.

Sect. 4 of the same Act provides that in a suit (now action) for partition where, if the Act had not been passed, a decree for partition might have been made, then, *if the party or parties interested individually or collectively to the extent of one moiety*, or upwards, in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court *shall*, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.

The principle on which the Courts proceed in dealing with this section, said Lord Hatherley in a well-known case, is that if the votes are equally divided, one half of the persons interested in the property desiring a sale, and the other half a partition, then the half requiring the sale shall have the preponderating voice, and the Court shall be bound to give them a sale wholly irrespective of the 3rd section. But still there is a certain discretion left to the Court.

Sect. 5 confers upon the Court a discretionary power to order a sale *at the request of any party*, however small his interest may be, unless the parties who oppose the sale are willing to take his share at a valuation.

Under this section the House of Lords in a leading case ordered a sale at the request of persons who were entitled to three-sixteenths of the property, although the owners of the remaining thirteen-sixteenths objected to the sale, and offered to buy the three-sixteenths at a valuation <sup>(1)</sup>.

It will thus be seen that the three sections 3, 4 and 5 of the Partition Act, 1868, deal with three perfectly different sets of circumstances.

In cases under sect. 3 the Court has got a discretionary power, owing to the peculiar circumstances of the case before it.

Under sect. 4, the question is as to the wish of the parties interested in the property, and if those interested to an extent of a moiety or upwards ask for a sale, a Court shall direct a sale, that is, it is imperative upon the Court to order it unless it sees some good reason to the contrary.

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(1) *Pitt v. Jones*, 5 App. Cas. 659.

Sect. 5 confers upon the Court a discretionary power to order a sale at the request of any party, unless the opposing parties will agree to take his share at a valuation, in which case the party requesting the sale may either accept that valuation or not. If he does not choose to accept that valuation, he cannot be forced to do so; but will then have his common law right to a partition. In a case decided in 1888 it was laid down that the burden of proof is on the applicant to shew some good reason for ordering a sale <sup>(1)</sup>.

Sect. 6 of the Partition Act, 1876, provides that a request for sale may be made on an undertaking to purchase given on the part of a married woman, infant, or person under disability <sup>(2)</sup>. Partition Act, 1876.

It frequently happens that a very large number of persons are interested in the property which is made the subject of a partition action.

Several difficulties which had arisen in the working of the Partition Act of 1868 were remedied by the provisions of the Act of 1876. Sect. 7 provides that for the purposes of the Partition Act, 1868, and of that Act, an action for partition shall include an action for sale and distribution of the proceeds, and that in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition. Another section gives the Court a discretionary power to dispense with service of notice of the judgment on the hearing of an action for partition, when it appears to the Court either that notice cannot be served on all the persons required by the Partition Act of 1868, or when they cannot be served without expense disproportionate to the value of the property <sup>(3)</sup>.

<sup>(1)</sup> *Richardson v. Feary*, 39 Ch. D. 45, where the authorities are reviewed.

<sup>(2)</sup> The request for sale by a married woman ought to be made by counsel instructed by a solicitor, formally authorized (*Grange v. White*, 18 Ch. D. 612).

The request for sale by an infant may be made by his next friend or guardian *ad litem*, but will not be granted unless it is for his benefit (*Rimington v. Hartley*, 14 Ch. D. 630).

<sup>(3)</sup> The Court may now direct advertisements to be published at such times and in such manner as it shall think fit; and the Act provides that after the expiration of the time

so limited, all persons who shall not have so come in and established some claim, whether they are within or without the jurisdiction of the Court (including persons under any disability), shall be bound by the proceedings in the action as if, on the day of the date of the order dispensing with service, they had been served with notice of the judgment, service whereof is dispensed with: see further as to partition, Brett's Leading Cases in Equity, notes to *Pemberton v. Barnes*, p. 45, *et seq.*

The general rule as to costs in partition actions is that they are to be borne by the parties proportionately to their interests in the property. Here, however, the Court has

A person who is entitled in remainder or reversion cannot commence an action for partition <sup>(1)</sup>.

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a discretion: *Cannon v. Johnson*, L. R. 11 Eq. 90; *Ball v. Kemp-Welch*, 14 Ch. D. 512.

In the absence of agreement only party and party costs are allowed: *Ball v. Kemp-Welch*, 14 Ch. D. 512.

It was held in a recent case that in an action for partition or sale of property, the title should not be

proved in Court in the first instance, unless the property is small and its title simple: *Hawkins v. Herbert*, 60 L. T. 142; and see *Wood v. Gregory*, 43 Ch. D. 82.

<sup>(1)</sup> *Evans v. Bagshawe*, L. R. 5 Ch. 340; and see *Waite v. Bingley*, 21 Ch. D. 674, where the property was in mortgage.



## CHAPTER V.

## MORTGAGES—CHARGES—LIENS.

The general principle upon which the Courts proceed in assisting the mortgagor to recover the mortgaged property, has been already pointed out in considering the subject of mortgages in connection with the law of property <sup>(1)</sup>.

General principle upon which the Courts proceed.

The Court looks at the substance of the transaction. The money not having been paid, the estate of the mortgagee is absolute in law, but the Court interferes and asks what is the real contract, and when the transaction is a mere security for money enforces the right of the mortgagor to get back his property on payment of the amount due with interest and costs.

This then being the general principle which justifies the interference of the Court in dealings between mortgagor and mortgagee, let us next consider by what principles it is guided in the particular forms of proceedings which are employed by the parties interested in mortgage transactions. These principles have been well stated by Mr. Coote as follows :—

“The Court considers that the mortgagor, notwithstanding his breach of condition and the consequent forfeiture at law of his estate shall be relievable, on payment of principal, interest, and costs, and that the mortgagee in possession ought to be held accountable for the rents and profits. On the other hand, it is but just that the mortgagee should not be subject to a perpetual account, nor converted into a perpetual bailiff, but that, after a fair and reasonable time given to the mortgagor to discharge the debt, he should lose his equity, or, in other words, be foreclosed or precluded from his right of redemption. The mortgagor is accordingly assisted in recovering his property by judgment or order of redemption. The mortgagee is assisted in recovering his money by judgment or order of foreclosure” <sup>(2)</sup>.

“What is the principle?” asked Sir George Jessel. “The

<sup>(1)</sup> *Ante*, p. 97, where the judgment in *Tarn v. Turner*, 39 Ch. D. 456, is quoted.

<sup>(2)</sup> Seton on Decrees, 4th ed. p. 1041; Coote on Mortgages.

Redemption and foreclosure.

principle in a Court of Equity has always been that, though a mortgage is in form an absolute conveyance where the condition is broken, in equity it is always security; and it must be remembered that the doctrine arose at the time when mortgages were made in the form of conditional conveyance, the condition being that if the money was not paid at the day, the estate should become the estate of the mortgagee. That was the contract between the parties. Yet Courts of Equity interfered with actual contract to this extent, by saying that there was a paramount intention that the estate should be security, and that the mortgage money should be debt, and they gave relief in the shape of redemption on that principle. Of course that would lead, and did lead, to this inconvenience that even where the mortgagor was not willing to redeem, the mortgagee could not sell or deal with the estate as his own, and to remedy that inconvenience the practice of bringing a foreclosure suit was adopted by which a mortgagee was entitled to call on the mortgagor to redeem within a certain time under penalty of losing the right of redemption" (1).

Form of judgment.

A great change has been recently introduced into the form of judgments in mortgage actions. This change is a logical consequence of the Judicature Act, which has "transferred the old jurisdiction of the Courts of Law and Equity to the new tribunal the High Court" (2).

Before the Judicature Act (3) the mortgagee had two rights against the mortgagor which were enforced in different tribunals. He had a *personal* remedy against the mortgagor on the covenant for payment, and this he enforced by an action in the Common Law Court. He was also entitled to a remedy against the *property*, and this he could enforce by a suit in equity for foreclosure. Now as both Courts are combined in the High Court, the mortgagee may combine both remedies, the claim on the covenant and the claim for foreclosure in one proceeding in one and the same Court. As illustrating how this practically works, we may direct the reader's attention to a recent case (4) in which the present form of the order of the Court was settled by the Court of Appeal as follows:—

(1) Per Jessel, M.R., in *Campbell v. Holyland*, 7 Ch. D. 171.

(2) *Salt v. Cooper*, 16 Ch. D. 544, 549.

(3) *Dymond v. Croft*, 3 Ch. D. 512; *Farrer v. Lacy, Hartland & Co.*, 31 Ch. D. 42, 49; *Bissett v. Jones*, 32 Ch. D. 637; *Exchange and Hop Ware-*

*houses, Limited v. Association of Land Financiers*, 34 Ch. D. 195; and see Brett's Leading Cases in Equity, pp. 160, 264, where the authorities on the subject are considered.

(4) *Farrer v. Lacy, Hartland & Co.*, 31 Ch. D. 42, 51.

This Court Doth Order and Adjudge that the plaintiff [*name*] do recover against the defendant [*name*] £ , being the total of the principal sum of £ , and of £ for interest thereon at £ per centum per annum less tax, to the day of [*the date of the judgment*], and also so much of his costs of this action as would have been incurred if it had been brought for payment only, such costs to be taxed by the Taxing Master.

Form of  
judgment.

This Court Doth Order and Adjudge that the following account be taken :—

1. An account of what is due to the plaintiff for principal and interest under the defendant's covenant to pay contained in the indenture of mortgage, dated [or promissory note or as the case may be] in the pleadings mentioned.

And it is ordered that the plaintiff [*name*] do recover against the defendant [*name*] the amount which shall be certified to be due to him on taking the said account, and also so much of his costs of this action as would have been incurred if it had been brought for payment only, such costs to be taxed by the Taxing Master.

And it is Ordered that the following [*further*] accounts be taken :—

2. An account of what is due to the plaintiff under and by virtue of his mortgage security dated in the pleadings mentioned, and for his costs of this action, to be taxed by the Taxing Master, and in taking such account what if anything the plaintiff shall have received from the defendant, under the aforesaid judgment, is to be deducted, and the balance due to the plaintiff is to be certified.

The remaining portion of the judgment then provides for further accounts, and finally directs that in default of payment the defendant shall be foreclosed (*i.e.* precluded) from all "right, title, interest, and equity of redemption," in the premises <sup>(1)</sup>.

The practice with regard to foreclosure and redemption actions has been most materially altered by the Rules of December, 1885, Order LV., rr. 5A and 5B, under which relief can in the majority of cases be obtained by originating summons (as to which, see *post*, p. 786).

These rules provide that any mortgagee or mortgagor whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage whether

(1) See as to judgment in default of pleadings, *Faithfull v. Woodley*, 43 Ch. D. 287.

Origina-  
ting sum-  
mons.

legal or equitable, may take out as of course an originating summons returnable in the chambers of a Judge of the Chancery Division for such relief of the nature or kind following as may by the summons be specified and as the circumstances of the case may require (that is to say)—(1) sale; (2) foreclosure; (3) delivery of possession by the mortgagor; (4) redemption; (5) reconveyance; (6) delivery of possession by the mortgagee.

5 B. "The persons to be served with the summons under the last proceeding shall be such persons as under the existing practice of the Chancery Division would be the proper defendants to an action for the like relief as that specified by the summons."

The *modus operandi* in this new procedure may be illustrated by a somewhat elaborate form of summons which is supposed to be taken out by an insurance company who are first mortgagees of freeholds. The circumstances of the case are rendered somewhat more complicated, and therefore it is to be hoped more instructive to the student if he will be at the pains to follow out and master the details, by the fact that the property had been *ex hypothesi* originally mortgaged in the somewhat unusual form of demise for a long term (*ante*, p. 99), and that the "equity of redemption" (*ante*, p. 98) had been subsequently made the subject of a settlement. It must, however, be borne in mind that where the plaintiff claims a personal judgment against the mortgagor, he ought not to proceed by summons, but should bring an action <sup>(1)</sup>.

The summons for relief by the mortgagee might be in the following form <sup>(2)</sup> :—

1890 A. No. .

In the High Court of Justice,  
Chancery Division.

Mr. Justice . . . . .

Between the A. Fire Office . . . . . Plaintiffs;  
and

R. M., M. T., H. T., R. M. L., F. L., and  
T. J. M. M. (an infant) and J. L.,  
A. S. M. and F. P., and E. E., Widow  
G., N. E. and W. E. E. . . . . Defendants.

Let the defendant R. M. the tenant for life under the will of

<sup>(1)</sup> *Brooking v. Skewis*, 58 L. T. (N.S.) 73. See as to jurisdiction, *Re Giles*, 43 Ch. D. 391.

<sup>(2)</sup> *Marcy and Dodd on Originating Summons*, p. 397. The reader's at-

tention may be particularly directed to the evidence contained in pages 398, *et seq.*, in support of the summons given above, viz. an affidavit of the company's secretary, and it is

the late R. B. M., of \_\_\_\_\_, in the county of \_\_\_\_\_, Esq.; the defendants M. T. and H. T., the second mortgagees of the life estate of the said R. M.; the defendants R. M. L. and F. L. the trustees of the said will, the defendant T. J. M. M. (an infant), the first tenant in tail male in remainder under the said will, and the defendants J. L., A. S. M., and F. P., the trustees of a term of 1000 years and of a portion charge of £5000 created under a power contained in the said will, and the defendants E. E., G. W. E., and W. E. E., the executors and devisees of trust estates of the late G. N. E., the surviving trustee of the marriage settlement of the defendant R. M.; and in whom a term of 1000 years is vested for securing portions charged under a power contained in the said will, attend at the chambers of Mr. Justice \_\_\_\_\_, at the Royal Courts of Justice, Strand, London, at the time specified in the margin hereof, upon the application of the A. Fire Office, whose office is at \_\_\_\_\_, in the county of \_\_\_\_\_, the first mortgagees (under R. S. C., Order LV., r. 5A) that an account may be taken of what is due to the plaintiffs for principal, interest, and costs on a mortgage dated the 10th day of July, 1845, and made between the said R. B. M. of the one part; R. H., R. B., and G. P. of the other part; and that the said mortgage may be enforced by foreclosure in the terms of the minutes annexed to this summons.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1890.

The following is the order which the Court would be asked to make on the above summons:—

Order on  
summons.

In the High Court of Justice,  
Chancery Division.

The A. Fire Office *v.* M. and Others.

Let an account be taken of what is due to the plaintiffs under and by virtue of their mortgage security dated the 10th day of July, 1845, in the summons mentioned and for their costs of this action to be taxed by the Taxing Master; and let, upon the defendants R. M., M. T., H. T., R. M. L., and F. L., T. J. M. M., J. L., A. S. M., F. P., E. E., G. N. E. and W. E. E., or any of them, paying to the plaintiffs what shall be certified to be due to them under and by virtue of their said security within six calendar months from the date of the Chief Clerk's certificate at such time and place as shall be thereby appointed, the plaintiffs

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to be noted in passing that as the deed in this case is upwards of thirty years old it does not require to be proved strictly (*post*, p. 860), an affidavit of

the solicitor of the company as to the facts that are within his knowledge, and also evidence as to the death of one of the trustees, and other matters.

Order on  
summons.

assign, surrender, or otherwise assure the mortgage premises during the residue of the term of 1200 years created by the said indenture, free and clear of and from all incumbrances done by the plaintiffs or any persons claiming by, from, or under them, or by those under whom they claim, and deliver up upon oath all deeds and writings in their custody or power relating to the said premises to the said defendants, or to such one or more of them as shall so redeem the plaintiffs, or as he or they shall direct, such assurance to be settled by the judge in case the parties differ about the same.

The order then goes on to direct that in case the defendants, or any or either of them, should redeem the plaintiffs, the person or persons so redeeming should be at liberty to apply to the Court for any proper further accounts and directions, and proceeds as follows:—"But in default of the said defendants, or any or either of them so redeeming the plaintiffs by the time aforesaid, let the defendants from thenceforth stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption in and to the hereditaments and premises comprised in the plaintiffs' said mortgage security during the residue of the term created by the said indenture of the 10th day of July, 1845."

The rule of the Court is, where there are several incumbrancers, that where the defendants do not appear, one period only for redemption is allowed. If any subsequent mortgagee appears and claims to have successive periods fixed, the Court will have to consider whether he is entitled to them <sup>(1)</sup>.

Account  
against  
mortgagee  
in possession.

Let us now consider how the account is taken against a mortgagee in possession. It is a well-established rule that a mortgagee cannot charge 5 per cent. to be increased to six, if the money be not paid at the proper time. A clause is accordingly not uncommonly inserted, with a view to secure the punctual payment of interest, providing for payment at a higher rate of interest than that which is agreed upon, with a proviso reducing the interest to the stipulated amount (*e.g.* 6 per cent. reducible to 5 per cent.), in case payment be made either on the proper day, or within a short time, generally one month, thereafter <sup>(2)</sup>.

It was decided by the late Sir George Jessel that under such a proviso reducing the rate of interest on punctual payment, a mortgagee who is in possession, through the default of the

<sup>(1)</sup> *Platt v. Mendel*, 27 Ch. D. 161.

46; *Tufnell v. Nichols*, 56 L. T. (N.S.) 152, and see *Smithett v. Hes-*

*keth*, 44 Ch. D. 161.  
<sup>(2)</sup> *Union Bank of London v. Ingram*, 16 Ch. D. 53.

mortgagor, may charge the higher rate of interest, although he receives the rent on or before the day fixed for payment of the interest. In this case the practice as to taking an account against a mortgagee in possession was stated as follows :—

Account  
against  
mortgagee  
in possession.

“In taking the account you take all the mortgagee’s receipts and place them on the one side of the account, that is to say, you take all his receipts, whether they arise from the rents, or whether they arise from accidental payments, so to speak, such as fines or heriots; whatever the mortgagee has received from the mortgaged property is charged against him. Then, on the other side of the account you give him credit for his principal and all his interest. The result is that if the rents are more than the interest he keeps the rents without paying interest on the excess; if less, the mortgagor does not pay interest on the unpaid balance of interest. It is an accident in whose favour the account so taken may happen to be, but this is the mode of taking the account. Therefore it is not true to say that the rents are appropriated for the interest, for all the rents and receipts go in reduction of the principal and interest” (1).

A point which it is very important to bear in mind is that just as the conveyance in a mortgage is in form absolute but in substance only security, so the final judgment foreclosing or precluding the mortgagee from all right of redemption is also in its nature fictitious. The final judgment in a foreclosure action, to quote from a well-known case (2), is in form absolute, but though absolute in form it really is not so in substance and still remains subject to the discretion of the Court. The absolute foreclosure is in form that the mortgagor should not be allowed to redeem at all; but it is form only, just as the original

Judgment  
of fore-  
closure.

(1) Per Jessel, M.R., in *Union Bank of London v. Ingram*, 16 Ch. D. 53.

(2) *Campbell v. Holyland*, 7 Ch. D. 171. A further point which was discussed in this case is worth noticing. The argument had been pressed, you must not interfere against purchasers. On this Sir George Jessel said: “There are purchasers and purchasers. If the purchaser buys a freehold estate in possession after the lapse of a considerable time from the order of foreclosure absolute, with no notice of any extraneous circumstances which would induce the Court to interfere, I, for one, should decline to interfere with such a title as that; but if the purchaser bought the estate within twenty-four hours after the fore-

closure absolute, and with notice of the fact that it was of much greater value than the amount of the mortgage debt, is it to be supposed that a Court of Equity would listen to the contention of such a purchaser that he ought not to be interfered with? He must be taken to know the general law, that an order for foreclosure may be opened under proper circumstances and under a proper exercise of discretion by the Court; and if the mortgagor in that case came the week after, is it to be supposed a Court of Equity would so stultify itself as to say that a title so acquired would stand in the way? I am of opinion it would not.”

Judgment  
of fore-  
closure.

deed was form only, for the Courts of Equity soon decided that, notwithstanding the form of that order, they would after that order allow the mortgagor to redeem. That is, although the order of foreclosure absolute appeared to be a final order of the Court it was not so, but the mortgagee still remained liable to be treated as mortgagee, and the mortgagor still retained a claim to be treated as mortgagor subject to the discretion of the Court. Therefore everybody who took an order for foreclosure absolute knew that there was still a discretion in the Court to allow the mortgagor to redeem.

“Of course the discretion which exists as to opening the foreclosure, as it is called, is a judicial discretion, and is only to be exercised upon fixed principles. The terms depend upon the circumstances of the case, but there are certain things that are always to be taken into account. In the first place, the mortgagor must come, as it is said, promptly, that is within a reasonable time. He is not to let the mortgagee deal with the estate as his own—if it is a landed estate, the mortgagee being in possession of it and using it—and then without any special reason come and say “now I will redeem.” He cannot do that, he must come within a reasonable time. What is a reasonable time? You must have regard to the nature of the property. Another element which must always be taken into account is the nature of the property. Thus if an estate was worth £50,000, and had been foreclosed for a mortgage debt of £5000, the man who came to redeem that estate would have a longer time than where the estate was worth £5100, and he was foreclosed for £5000. But not only is there money value, but there may be other considerations. Thus, the property mortgaged may be an old family estate, or a chattel, or a picture, which possesses a special value for the mortgagor, and does not possess the same value for other people.”

The Court has no power to add to a foreclosure judgment. The judgment is in itself, when made absolute, final, subject to this, that even after the absolute judgment has been made, the Court, in a proper case, within a short and reasonable time, may allow further time, on the conditions which it always imposes, for the purpose of letting in the defendant to redeem. Subject to that observation, the action is at an end <sup>(1)</sup>.

A mortgagee who takes possession must account for the rents and profits of the property, and if he is guilty of what is called

(1) *Wills v. Luff*, 38 Ch. D. 197, 200, where the Court refused to appoint a receiver after judgment for

foreclosure absolute, and that though the conveyance of the property remained to be settled.



wilful default in not getting in the rents and profits, he will be charged with the amount that he might have received had he not been guilty of default; and he may also be charged with an occupation rent, if he occupies any part of the property himself. A mortgagee who has expended money in permanent works on the property is entitled to be repaid his expenditure, so far as it has increased the value of the property. It is immaterial whether the mortgagor had notice of the expenditure, and notice to the mortgagor is only material where the expenditure is unreasonable for the purpose of shewing that he acquiesced in it <sup>(1)</sup>.

Mortgagee  
in posses-  
sion.

The rule with regard to the rights of parties in foreclosure or redemption actions "is redeem up," foreclose down. Where there are more incumbrancers than one, the mesne or intermediate incumbrancers must successively redeem all persons prior to themselves or be foreclosed. On the other hand, they must be redeemed by or are entitled to foreclose all persons subsequent to themselves <sup>(2)</sup>.

To what costs is a mortgagee entitled? Order LXV. which renders all costs subject to the discretion of the Court, expressly provides that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted, or carried on, or resisted, any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division. The right of a mortgagee to his costs is a matter of contract, and he has an absolute right to them unless forfeited by misconduct <sup>(3)</sup>.

Mort-  
gagee's  
costs.

The principle on which the Court proceeds in settling the account between a mortgagor and mortgagee was stated in an old case <sup>(4)</sup>. It is to give the mortgagee all that his contract, or the legal or equitable consequences of it, entitle him to receive, and all the costs properly incurred in ascertaining or defending such rights, whether at law or in equity. This principle is still recognised by the Courts <sup>(5)</sup>.

It may be well here to again call the reader's attention to the mode in which the rights of a mortgagee are barred by the Real Property Limitation Act 1874. It has been decided that after twelve years from the last payment of interest or acknow-

Real Prop-  
erty  
Limitation  
Act.

<sup>(1)</sup> *Shepard v. Jones*, 21 Ch. D. 469.

see as to costs generally, *post*, p. 801, *et seq.*

<sup>(2)</sup> Seton on Decrees, vol. ii. p. 1085.

<sup>(4)</sup> *Dryden v. Frost*, 3 My. & Cr. 670.

<sup>(3)</sup> *Cotterell v. Stratton*, 8 Ch. D. 295;

*Turner v. Hancock*, 20 Ch. D. 303;

*Charles v. Jones*, 33 Ch. D. 80; and

<sup>(5)</sup> *National Provincial Bank of England v. Games*, 31 Ch. D. 582.

ledgment in writing of debt, the personal remedy of the mortgagee upon the covenant is barred, as well as the remedy against the land <sup>(1)</sup>.

Vendor's  
lien.

The doctrine of vendor's lien for unpaid purchase-money may also here be noticed. This doctrine as stated by Lord Eldon in the leading case of *Mackreth v. Symmons*, is that where a vendor conveyed an estate and the purchase-money or part of it is unpaid, then, though the consideration is upon the face of the instrument and by a receipt indorsed upon the back expressed to be paid, the vendor is considered to have a lien on the estate for the money remaining due to him. This lien applies not only to freehold property, but also to copyhold and leasehold, but does not exist in the case of mere personal chattels. It exists not only against the purchaser, but also against volunteers, *i.e.* persons not entitled for value against purchasers with notice, but not against *bonâ fide* purchasers without notice who have obtained the legal estate without notice. The lien may be lost by negligence. It has been decided that the fact that the vendor has taken a bond, or bill, or security, for his purchase-money, or the balance of it, would not put an end to the lien. The question is one to be determined upon the circumstances of the case, whether the Court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the security was taken. Closely connected with the vendor's lien for unpaid purchase-money, is the purchaser's lien for prematurely paid purchase-money, which arises when the contract for purchase fails without any misconduct or default of the purchaser <sup>(2)</sup>.

In such cases the order of the Court would be the following form:—

Declare that the plaintiff is entitled to a lien upon the said hereditaments in respect of the said purchase-money, with interest thereon at the rate of £5 per cent. per annum from, &c., until payment, and also for the plaintiff's said costs. And in case of default being made in such payment or payments as aforesaid, the plaintiff is to be at liberty to apply to this Court to enforce such lien.

Charge.

A charge like a lien is enforced by sale. "A charge differs altogether from a mortgage. By a charge the title is transferred,

<sup>(1)</sup> *Sutton v. Sutton*, 22 Ch. D. 511, and see *ante*, p. 205, *et seq.*

<sup>(2)</sup> *Wythe v. Lee*, 3 Drew. 396; *Rose v. Watson*, 10 H. L. 672;

*Torrance v. Bolton*, 14 Eq. 124. See Locke King's Amendment Acts, *ante*, pp. 551, 552.

but the person creating the charge merely says that out of a particular fund he will discharge a particular debt" (1).

The question who is entitled to redeem, may now be considered.

It was laid down broadly by the late Lord Chancellor Hatherley, that any person interested in the equity of redemption is entitled to redeem. Thus it has been decided that the heir, the devisee of the equity of redemption, a tenant for life, a remainderman, a reversioner, a tenant by the courtesy, an assignee of the mortgagor, subsequent mortgagees on bringing the mortgagor before the Court, sureties, trustees in bankruptcy, and volunteers, even though claiming under a deed void against the mortgagee, may all redeem (2). In a very recent case to which we have previously alluded, where the question was most carefully considered, it was decided that a tenant for years under an agreement with the mortgagor has an estate in the land which entitles him to redeem the mortgage (3).

Who is  
entitled to  
redeem.

The remedies of a mortgagor with special reference to his position when a tender of the amount due is properly made by him, and improperly rejected by the mortgagee, were much considered in a case which came before the Privy Council in 1889. The law was then summed up as follows:—

Tender of  
amount  
due.

There is no foundation for the proposition that a tender properly made and improperly rejected is equivalent to payment in the case of a mortgage. The proposition seems to be founded on a mistaken analogy. If a chattel be pledged, the general property remains in the pledgor. The pledgee has only a special property. According to the doctrines of common law, that special property is determined if a proper tender is made and refused. The pledgee then becomes a wrongdoer. The pledgor can at once recover the chattel by action at law. But it is not so in the case of a mortgage, where the mortgagor's estate is gone at law, nor is it so in the case of an equitable mortgage. A mortgagor coming into equity to redeem, must do equity and pay principal, interest, and costs, before he can recover the property which at law is not his. So it is in the case of an equitable mortgage. It is a well established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the

(1) *Burlinson v. Hall*, 12 Q. B. D. 227; Seton on Decrees, p. 1051.  
347.

(3) *Tarn v. Turner*, 39 Ch. Div.

(2) *Pearce v. Morris*, L. R. 5 Ch. 456.

interest of the person who makes the deposit. In the absence of consent that charge can only be displaced by actual payment of the amount secured. Before the fusion of law and equity a Court of Equity would undoubtedly have restrained the legal owner of the property from recovering his title deeds at law so long as the charge continued, and now when law and equity are both administered by the same Court, if there be any conflict, the rules of equity must prevail <sup>(1)</sup>.

Provisions  
of Convey-  
ancing Act,  
1881.

By section 25 of the Conveyancing Act, 1881, which applies to actions brought either before or after the commencement of the Act (1st Jan., 1882), any person entitled to redeem mortgaged property may have a judgment or order for *sale* instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

The same section also provides that in any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

The subsequent sub-sections enable the Court to order such security for costs as it thinks fit, and to direct a sale without previously determining the priorities of incumbrances.

This section enables the Court to order a sale before trial, and also after judgment, at any time before foreclosure absolute <sup>(2)</sup>.

<sup>(1)</sup> Per Lord Macnaghten in *Bank of New South Wales v. O'Connor*, 14 App. Cas. 273. In this case the present practice was stated to be where a proper tender has been made and refused, to make an order giving the mortgagor liberty to pay into Court a stated sum sufficient to cover the amount of principal and interest, and the probable costs of the action, and then upon payment into Court, but not till then, the mortgagee is required by the order to deliver up the title deeds.

<sup>(2)</sup> It was decided in a recent case (*Kinnaird v. Trollope*, 39 Ch. D. 636), that a mortgagor who has absolutely assigned his equity of redemption in the mortgaged property acquires when sued by the mortgagee upon the covenant to pay principal and interest contained in the mortgage, a new right to redeem, and is entitled upon paying the mortgage money to a reconveyance to himself, subject to any equity of redemption vested in any other person. And that he is so entitled, even if after the

“One effect of this Act, which confers upon the Court a very beneficial power,” said Jessel, M.R., “is to allow a mortgagor whose property is worth more than the mortgage money, but who cannot raise it to obtain a sale and get the benefit of the surplus: the Court has power to impose terms so as to take care that no injustice shall be done to any one” <sup>(1)</sup>.

Power to  
order sale.

A mortgagee, as has already been pointed out (*ante*, p. 103), may pursue all his remedies at the same time, when once default has been made by the mortgagor.

If a mortgagee takes possession when there is no interest due to him, an account will *in general* be directed against him with annual rests, *i.e.* the surplus of rents and profits over the interest will be applied in reduction of principal <sup>(2)</sup>.

It must be remembered that the county courts have jurisdiction in all actions “for foreclosure or redemption or for enforcing any charge or lien where the mortgage, charge, or lien, shall not exceed in amount the sum of £500,” and that a plaintiff who commences proceedings in the High Court where the mortgage does not exceed £500, runs the risk of finding himself ultimately in the unpleasant position of only obtaining such costs as he would have been allowed in the county court <sup>(3)</sup>.

assignment of the equity of redemption, the assignee has further charged the property either to the original mortgagee or to some other person.

<sup>(1)</sup> *Union Bank of London v. Ingram*, 20 Ch. Div. 463; *Woolley v. Colman*, 21 Ch. D. 169; and see Brett's *Leading Cases in Modern Equity*, p. 175, *et seq.*

<sup>(2)</sup> *Thorneycroft v. Crockett*, 2

H. L. C. 239; *Parkinson v. Hanbury*, L. R. 2 H. L. 1; *Nelson v. Booth*, 3 D. & J. 119; and see as to position of mortgagee in possession: *Re Prytherch*, 38 W. R. 61.

<sup>(3)</sup> *Scotto v. Heritage*, L. R. 3 Eq. 212; *Simon v. McAdam*, L. R. 6 Eq. 324; *Brown v. Rye*, L. R. 17 Eq. 343; *Crozier v. Dowsett*, 31 Ch. D. 67.

## CHAPTER VI.

## SPECIFIC PERFORMANCE.

**Definition.** Specific performance of a contract is its actual execution according to its stipulations and terms, as contrasted with damages or compensation for the non-execution of the contract<sup>(1)</sup>.

**Grounds for granting and refusing specific performance.**

The principal ground on which the Court grants specific performance is that the remedy by damages is inadequate, and that compensation in the shape of money would not put the party in as beneficial a situation as if the agreement was specifically performed<sup>(2)</sup>. The chief grounds on which the Court declines to enforce specific performance :—

1. Where the remedy by damages is adequate.
2. Where the performance of the contract would prove useless, *e.g.* a contract to enter a partnership not for a definite time, as the partnership might be dissolved at once.
3. Where the Court would find it impossible or too difficult to enforce performance, *e.g.* a contract for services of a personal character.

On this principle the Court will not enforce continuous acts or the continuous employment of persons. “The Court,” said Lord Justice James, “will, in a proper case, restrain a man from singing at a theatre, but it will not undertake to compel him to sing at another. It may restrain him from writing a book for one publisher, but it cannot compel him to write a book for another”<sup>(3)</sup>.

<sup>(1)</sup> All “causes and matters” for the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases, are assigned to the Chancery Division of the High Court of Justice by the 34th section of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66). A remarkable circumstance in connection with this doctrine is that no system of jurisprudence

except that administered by the Courts of Equity in England and its past or present colonies has ever attempted directly to enforce the specific performance of contracts: *Fry on Specific Performance*, 2nd ed. p. 3.

<sup>(2)</sup> *Falcke v. Gray*, 4 Drewry, 651, 657.

<sup>(3)</sup> *Powell Duffryn Steam Coal Co. v. Taff Vale Railway Co.*, 9 Ch. App. Cas. 331, at p. 335.

## 4. When the contract is voluntary (1).

In considering the question whether an action will lie for the specific performance of a contract, attention must be directed to many circumstances. First, among these, it must be remembered that the jurisdiction of the Court is discretionary. The meaning of this proposition is, not that the Court may arbitrarily or capriciously perform one contract and refuse to perform another; but that the Court has regard to the conduct of the plaintiff and to circumstances outside the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favour (2).

Grounds  
for grant-  
ing and  
refusing  
specific  
perform-  
ance.

The contract must be an actually concluded contract between the parties. So long as the matter rests in mere negotiation, or expectation of contract, there is no case for specific performance.

It must, however, be borne in mind that the maxim *certum est quod certum reddi potest* applies, and that accordingly where the price is left to be agreed upon in some definite way, or where the thing proposed is merely left for the other party to decide upon, the Court regards the contract as concluded.

When there is want of fairness and equality in the contract, the Court will not enforce specific performance. The fairness of the contract must be judged of at the time when the contract is entered into and not by the light of subsequent events. The Court will look at all the surrounding circumstances, *e.g.* if the person against whom specific performance is sought is illiterate or in distressed circumstances.

The Court will also decline to enforce a contract if the result would be to inflict great hardship, to be judged of at the time.

If, said Lord Thurlow, a man contracts to purchase an estate for a certain price, and the intending purchaser knows at the time that there are mines under the estate of which the vendor is ignorant, still, as the Court is not a Court of honour, the Court will not set aside the contract; but nobody can doubt that the Court would not decree specific performance of such a contract (3).

It is not, however, the doctrine of the Court, that a man cannot contract without his solicitor at his elbow, or that a man in insolvent circumstances, or in prison, is disabled from selling

(1) For a more exhaustive enumeration of the cases, in which the Court declines to enforce specific performance, see Fry on Specific Performance, 2nd ed. p. 14, *et seq.*

(2) Fry on Specific Performance, 2nd ed. p. 12, citing *Lamare v. Dixon*, L. R. 6 H. L. 414.

(3) Quoted in *Falcke v. Gray*, 4 Drew. 661.

his estate; and if a contract is made under such circumstances as will bear the careful examination of the Court and the full light of day, it will be specifically performed.

**Mutuality.** Again, in order that the Court should grant specific performance of a contract, there must be mutuality of obligation. On this principle an infant cannot have specific performance of a contract because the contract could not be specifically enforced against him. It has been decided, however, that the doctrine of non-mutuality being a bar to specific performance does not apply to a contract which, in the knowledge of both parties, cannot be enforced by either, until the occurrence of a contingent event, *e.g.* until the plaintiffs were able to buy the land, part of which they proposed to sell to the defendant <sup>(1)</sup>.

The Courts have also always proceeded on the principle laid down by Lord Alvanley nearly ninety years ago, that a party cannot call upon a Court of Equity for a specific performance unless he has shown himself "ready, desirous, prompt, and eager" <sup>(2)</sup> to perform his part of the agreement.

4th section  
of Statute  
of Frauds.

The 4th section of the *Statute of Frauds* provides that "no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized" <sup>(3)</sup>.

On these words it has been judicially observed as follows:—"The Statute of Frauds says that no action or suit shall be maintained on an agreement relating to lands, which is not in writing, signed by the party to be charged with it; and yet the Court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of writing so signed, as a bar to his relief" <sup>(4)</sup>.

Specific  
perform-  
ance of  
contracts  
not in  
writing.

The cases in which contracts not in writing may be specifically enforced are in—

- (1) Sales by the Court;
- (2) Contracts where the non-reduction to writing was caused by the fraud of the other party;
- (3) In cases where the defendant omits to plead the statute;
- (4) If part performance of a verbal contract has occurred.

<sup>(1)</sup> *Wylson v. Dunn*, 34 Ch. D. 569.

<sup>(2)</sup> *Milward v. Earl of Thanet*, 5 Ves. 720 n., decided in 1801.

<sup>(3)</sup> See as to the admission of

parol evidence to connect independent documents, *Oliver v. Hunting*, 44 Ch. D. 205.

<sup>(4)</sup> *Bond v. Hopkins*, 1 S. & L. 433.



In order, however, that specific performance should be granted of a parol contract with regard to land, or, as it is sometimes expressed, that the case should be "taken out the statute," it is necessary that the following points should be found in the case:—

(1) The act of part performance must have relation to the agreement relied upon, and to no other; Part performance.

(2) There must be some clear evidence to connect the alleged part performance with the alleged agreement;

(3) The act must change the relative positions of the parties as to the subject-matter of the contract; must in fact be such as to render non-performance a fraud. The contract must be one with relation to land <sup>(1)</sup>.

Acts preparatory to the completion of a contract, ancillary or introductory acts, *e.g.* the payment of a part, or even of the whole of the purchase-money, the delivery of the abstract, are not regarded by the Court as acts of part performance which take a case out of the statute.

"Courts of Equity," said Lord Cottenham, "exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has upon the faith of such engagement expended his money, or otherwise acted in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected; and, with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect, if it can, what the terms of it really were" <sup>(2)</sup>. It must, however, never be forgotten on the other hand that, though a contract be in writing, it by no means follows that it will be enforced. "The Statute of Frauds says an unwritten agreement shall not bind, but it does not say a written agreement shall bind." It should also be remembered that the defence of the Statute of Frauds must be specially pleaded <sup>(3)</sup>.

And now, having considered the principles on which the Court proceeds in granting or refusing specific performance

<sup>(1)</sup> *Maddison v. Alderson*, 8 App. Cas. 467, where the authorities are collected, and notes Brett's Leading Cases in Equity, p. 99, *et seq.* See also *McManus v. Cooke*, 35 Ch. D. 681, where the proposition that the

doctrine is confined to contract with regard to land is questioned.

<sup>(2)</sup> *Mundy v. Jolliffe*, 5 My. & Cr. at p. 177.

<sup>(3)</sup> R. S. C., 1883, Order xix., r. 15.

let us consider the various cases in which specific performance of contracts will be granted or refused.

Specific performance when granted.

The following are the principal cases in which specific performance is granted :—

(1) Where the contract is for the sale or lease of land, judgment for specific performance is given as a matter of course, unless the judgment would be useless, as when a lease if granted might be forfeited at once or when the term has expired before the hearing of the action.

The reason why contracts with respect to land are so enforced is because land has often a peculiar and special value to a purchaser; and as Lord Hardwicke said, when a person agrees to purchase land it is generally on a particular liking to the land <sup>(1)</sup>: “One sovereign or one shilling is to all intents and purposes as good as any other sovereign or shilling, but one landed estate, though of precisely the same market value as another, may be vastly different in every other circumstance that makes it an object of desire” <sup>(2)</sup>.

Conveyancing Act, 1881.

The Conveyancing Act, 1881, provides that where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple, or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of the Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract <sup>(3)</sup>.

(2) For the sale of shares in companies, *i.e.* if any shares remain available, and unless the directors having power to refuse, decline to give their assent <sup>(4)</sup>.

(3) To execute a mortgage.

In a case which came before the Court in 1874 <sup>(5)</sup>, some doubt was expressed whether such a contract could be specifically enforced; but in a subsequent case <sup>(6)</sup>, Lord Selborne, sitting as Master of the Rolls, said that he had no doubt of the propriety of ordering specific performance of an agreement for the execution of a mortgage with an immediate power of sale, unless the defendant was prepared to pay off the advance at once.

(4) For the execution of deeds for *present* separation. The

<sup>(1)</sup> *Buxton v. Lister*, 3 Atk. 384.

<sup>(2)</sup> Fry on Specific Performance, p. 20, 2nd ed.

<sup>(3)</sup> 44 & 45 Vict. c. 41, s. 4.

<sup>(4)</sup> See Fry on Specific Perform-

ance, p. 620, *et seq.*, for an elaborate consideration of this subject.

<sup>(5)</sup> *Ashton v. Corrigan*, 13 Eq. 76.

<sup>(6)</sup> *Hermann v. Hodges*, 16 Eq. 18.

general principle of the law on the subject was settled by the celebrated case of *Wilson v. Wilson* <sup>(1)</sup> decided by the House of Lords in 1848, when it was laid down that a "now long train of authorities had established that such a contract ought to be enforced" <sup>(2)</sup>. A contract for *future* separation is regarded as contrary to the policy of the law and will not be specifically enforced. (See, as to Separation Deeds, *post*, p. 1038.)

Specific performance when granted.

(5) For the sale of goodwill if connected with business premises but not otherwise <sup>(3)</sup>.

(6) To execute disentailing deed <sup>(4)</sup>.

(7) For the purchase of articles of unusual beauty, rarity, and distinction, such as objects of vertu <sup>(5)</sup>. Thus in an oft-quoted case where a contract had been entered into for the purchase of two china jars, the Court, while it refused specific performance on the ground that the parties were not on an equal footing, the purchaser knowing and the vendor being ignorant of the value of the thing sold, said that in the absence of such objection it would have no hesitation in enforcing specific performance.

In another case specific performance was enforced of a contract to purchase the arch-stone, spandrel-stone, and the Bramley-fall stone, contained in the Old Westminster Bridge <sup>(6)</sup>.

(8) To enforce a compromise, but in such an action the plaintiff will not be allowed to contest over again the dispute which it was the object of the parties to settle for ever by their compromise <sup>(7)</sup>.

On the other hand, specific performance has been refused of contracts for the purchase of ordinary chattels, *e.g.* stock, corn, hops, &c., for here it was considered that damages was sufficient compensation <sup>(8)</sup>.

Specific performance when refused.

Specific performance has also been refused of contracts to do work, as to build, or repair, unless incidental to other part of contract. The Court, however, will assume such jurisdiction when the following three circumstances concur:—First, that the work to be done is defined; secondly, that the plaintiff has a material interest in its execution, which cannot adequately be

<sup>(1)</sup> 1 H. L. C. 538.

<sup>(2)</sup> The law on this subject was recently made the subject of careful consideration in *Hart v. Hart*, 18 Ch. D. 670 (where the previous authorities were reviewed), in which case the Court granted specific performance of an agreement for a separation deed which had been signed by both parties, and was entered into upon

a compromise in the Divorce Court.

<sup>(3)</sup> *Bozon v. Farlow*, 1 M. 459.

<sup>(4)</sup> *Banks v. Small*, 34 Ch. D. 415.

<sup>(5)</sup> *Falcke v. Gray*, 4 Drew. 658.

<sup>(6)</sup> *Thorn v. Commissioner of Public Works*, 32 Beav. 490.

<sup>(7)</sup> *Knowles v. Roberts*, 38 Ch. D. 263.

<sup>(8)</sup> Per Lord Hardwicke in *Buxton v. Lister*, 3 Atk. 384.

Specific  
perform-  
ance when  
refused.

compensated for by damages; and, thirdly, that the defendants have by the contract obtained from the plaintiff possession of the land on which the work is to be done <sup>(1)</sup>.

Where the contract was for all the get of coals from a colliery, at a fixed price for five years <sup>(2)</sup>, Jessel, M.R., declined to order specific performance or even to grant an injunction to restrain the breach of the contract.

The principle of this case was considered in a subsequent case <sup>(3)</sup>. There there was an agreement between Donnell and Cormack, a fish curer and fish smoker, that Cormack should sell and Donnell buy all parts of fish not used by Cormack in his business, and Cormack agreed that for the space of two years he should not sell any fish or parts of fish to any other manufacturer whatever, and the plaintiff further agreed to take all fish supplied him by Cormack at a named price. Here the Court, though it considered that there was no case for specific performance, granted an injunction against selling to any one else.

Representa-  
tion.

Another and difficult class of cases in which specific performance is enforced by the Court is, where there is a clear and absolute representation made for a particular purpose by one person and followed by conduct of another. In such a case the Court proceeds upon the principle that the person making those representations shall, so far as the powers of a Court of Equity extend, be treated as if the representations were true, and shall be compelled to make them good. But the representations must be representations concerning existing facts, and not of mere intention <sup>(4)</sup>.

Voluntary  
settle-  
ments.

Attention has already been directed (*ante*, p. 142) to the subject of voluntary settlements. Suppose now that a man has made a voluntary settlement of land, and subsequently enters into a contract to sell it. The principle upon which the Court proceeds is, that in such a case it will remain *neutral*. It will neither impede nor assist the vendor. In Lord Eldon's words the Court will not restrain a man who has previously made a voluntary settlement of real property from selling it to a purchaser; nor, on the other hand, will it in general help him to frustrate his own deed <sup>(5)</sup>.

In certain cases the Court will order specific performance of a

<sup>(1)</sup> Fry on Specific Performance, p. 38.

<sup>(2)</sup> *Fothergill v. Rowland*, L. R. 17 Eq. 132.

<sup>(3)</sup> *Donnell v. Bennett*, 22 Ch. D. 835.

<sup>(4)</sup> *Mills v. Fox*, 37 Ch. D. 153,

164, where the cases on what is called "estoppel by representation" are collected. See also Davidson on Settlements, vol. iii. p. 638, *et seq.*

<sup>(5)</sup> See May on Voluntary Settlements, 2nd ed. p. 511.

contract with compensation, *i.e.* with an abatement of the consideration. It may be shortly stated as the result of the decisions upon this subject, that where the vendor is able substantially to perform the contract, and there is a difference capable of being ascertained between what is promised and what can be performed, the Court may measure the difference and give judgment for specific performance with compensation. The purchaser may also, as a general rule, insist on taking what the vendor can give him with compensation for the amount <sup>(1)</sup>. The Court, however, will not order specific performance at the suit of the vendor, if the result would be to put upon the purchaser something essentially different from that for which he bargained.

Specific performance with compensation.

This may be illustrated by the well-known case of *Peers v. Lambert* <sup>(2)</sup>, where the contract was for sale of a wharf with a jetty, and, as it turned out that the jetty was removable by the Corporation of London and essential to the enjoyment of the property, specific performance was refused. A man who had contracted to purchase freehold was not forced to take copyhold <sup>(3)</sup>, and in another case where a man had bargained for a lease, he was not compelled to accept an underlease <sup>(4)</sup>.

A variation which is merely trifling, or a mere expression of courtesy, such as "we hope to give you possession on 1st Nov.," is not regarded as a variation in the contract.

In a recent case an action was brought for specific performance of a scheme of arrangement. The trustees in the bankruptcy had entered into a written agreement with the defendants, under which it was agreed that the defendants were to purchase the assets of the bankrupt, "who was their brother-in-law," on certain terms, and that on the approval of the scheme by the Court, the bankruptcy should be annulled. The creditors duly passed a resolution agreeing to the scheme; but added a clause that a bond should be given by the defendants for payment of the money. The Court subsequently approved the agreement and annulled the bankruptcy; but it was held by the Court that, as the scheme had not been accepted by the creditors or approved by the Court as originally agreed by the defendants, specific performance could not be enforced <sup>(5)</sup>.

The general principle on which the Court proceeds in granting or refusing specific performance of contracts, where there is

<sup>(1)</sup> See Seton on Decrees, 4th ed. p. 1315, *et seq.*, where the authorities are collected.

<sup>(2)</sup> 7 Beav. 546.

<sup>(3)</sup> *Ayles v. Cox*, 16 Beav. 23.

<sup>(4)</sup> *Madeley v. Booth*, 2 D. & S. 718.

<sup>(5)</sup> *Lucas v. Martin*, 37 Ch. D. 597.

Mistake.

a mistake, is as follows:—The broad rule is contained in the maxim of the Roman law, “*non videntur consentire qui errant.*” In applying this principle in practice the Court proceeds on the following line, “If it appears upon the evidence that there was in the description of the property a matter on which a person might *bonâ fide* make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this Court cannot enforce specific performance against him. If there appears on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcel, then I do not think it is sufficient for the purchaser to swear that he made a mistake, or that he did not understand what he was about” (1).

“The general rule of Equity,” said Lord St. Leonards, “is, that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. If a man, for instance, agree to settle an estate and execute his bond for £600 as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement. So if a man covenant to abstain from doing a certain act and agree that if he do it he will pay a sum of money, it would seem that he would be compelled to abstain from doing that act, and just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract” (2).

Damages.

The rule as to the damages which may be recovered for breach of a contract for the sale of land, forms an exception from the ordinary rule as to damages for breach of contract. In the case of non-delivery of goods contracted to be sold, the purchaser is entitled to recover either such damages as may fairly be considered to have been the natural result of the breach of the contract, or such as may reasonably be supposed to have been contemplated by both parties, at the time when they entered into the contract, as the probable result of a breach.

This principle, which was established by the leading case of *Hadley v. Baxendale* (*ante*, p. 422), has since been repeatedly followed as regulating the amount of damage to be given in cases of breach of contract in respect of personal property. The rule with regard to contracts for sale of land as settled by a

(1) *Swaishland v. Dearsley*, 29 Beav. 430, approved of in *Tamplin v. James*, 15 Ch. D. 217.

(2) *French v. Macale*, 2 Dr. & W. 269.

series of authorities is, however, that in the absence of special circumstances no damages for loss of the bargain will be given <sup>(1)</sup>.

The law on the important question as to whether the Court will order specific performance of a contract contained in a series of letters, has been now settled by a series of decisions:—

Contract contained in correspondence.

The principle is stated by the House of Lords as follows <sup>(2)</sup>: “If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then although the correspondence may not set forth in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say: ‘We will have this agreement put in due form by a solicitor.’”

If, however, the acceptance of the offer is not unqualified, but is only made subject to a condition that an agreement is to be prepared and settled between the parties, and that until that is done there is to be no contract, the Court will not order specific performance.

Another important principle which was established by a decision of the House of Lords is, that you must look at the whole of a correspondence. “It is,” said Lord Cairns, “one of the first principles applicable to a case of the kind, that where you have to find your contract, or your note, or your memorandum of the terms of the contract, in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say: ‘We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond.’ In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them” <sup>(3)</sup>.

<sup>(1)</sup> *Dart's Vendor and Purchaser*, 6th ed., vol. ii. p. 178, *et seq.*, and see *Bain v. Fothergill*, L. R. 7 H. L. 158; *Bristol Permanent Building Society v. Bomash*, 35 Ch. D. 390; *Gas Light and Coke Co. v. Towse*, 35 Ch. D. 519; *Rowe v. School Board for London*, 36 Ch. D. 619.

<sup>(2)</sup> *Rossiter v. Miller*, 3 App. Cas. 1124.

<sup>(3)</sup> *Hussey v. Horne-Payne*, 4 App. Cas. 311; and see *Winn v. Bull*, 7 Ch. D. 32; *Bonnevill v. Jenkins*, 8 Ch. D. 70; *May v. Thompson*, 20 Ch. D. 705, where Sir George Jessel expressed an opinion that the deci-

Description  
of parties.

A great many questions have arisen as to what is a sufficient description of the parties to a contract. The law on this subject has been thus summed up:—If the vendor is described in the contract as “proprietor,” “owner,” “mortgagee,” or the like, the description is sufficient, although he is not named, but if he is described as “vendor,” or as “client,” or “friend” of a named agent, that is not sufficient; the reason given being, in the language of Lord Cairns, that the former description “is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise” <sup>(1)</sup>.

Parol  
evidence of  
mistake.

In certain cases the defendant may successfully resist an action for specific performance of a contract by giving parol evidence of a mistake. In the celebrated case of the *Marquis of Townsend v. Stangroom* <sup>(2)</sup>, the plaintiff sought specific performance with a parol variation, and the defendant brought a cross suit—this would have been under the present practice, by counter-claim—and asked for the specific performance of the written contract as it stood. Lord Eldon refused to relieve either party.

Specific  
perform-  
ance with  
rectifica-  
tion.

A very important point was decided in a case which came before the Court in 1886, viz. that since the Judicature Act, 1873, the Court has jurisdiction in any case in which the Statute of Frauds is not a bar, in one and the same action, to rectify a written agreement, upon parol evidence of mistake, and to order the agreement as rectified to be specifically performed <sup>(3)</sup>.

A principle “fertile in results” which must always be borne in mind with regard to specific performance is that the jurisdiction of the Court is against the defendant personally.

Jurisdiction  
*in personam*.

The Courts of Equity in England, said Lord Selborne, in a leading case on the subject <sup>(4)</sup>, are, and always have been, Courts of conscience operating *in personam* and not *in rem*, and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which are not either locally or *ratione domicilii* within their jurisdiction.

sions of the Courts as to letters had gone quite far enough in spelling out a contract from letters where both parties intended a formal contract to be executed: and see *Bolton v. Lambert*, 41 Ch. D. 295; *Bristol, Cardiff, and Swansea Aerated Bread Co. v. Maggs*, 44 Ch. D. 616; *Belamy v. Debenham*, W. N. (1890) 150.

<sup>(1)</sup> *Rossiter v. Miller*, 3 App. Cas. 1124, 1141; *Jarrett v. Hunter*, 34 Ch. D. 182; *Sale v. Lambert*, L. R. 18 Eq. 1; *Potter v. Duffield*, L. R. 18 Eq. 4, 8.

<sup>(2)</sup> 6 Ves. 328.

<sup>(3)</sup> *Olley v. Fisher*, 34 Ch. D. 367.

<sup>(4)</sup> *Ewing v. Orr-Ewing*, 9 App. Cas. 234.



A very remarkable case standing, it would seem, almost by itself, in which the Court assisted a plaintiff with reference to his ultimate right for specific performance, may be noticed in this connection. An Englishman had agreed with a shipowner who was domiciled at Hamburg for the purchase of a Hamburg ship whenever she returned from the voyage in which she then was. The ship came to England, but the master of the ship, acting as the shipowner's agent, refused to deliver, except on certain terms. The Court granted an injunction against the removal of the ship from this country. "Where," said Lord Justice James, "the contract, as in this case, though made abroad, is to deliver a thing *in specie* to a person in this country, and the thing itself is brought here, then the Court here, in the exercise of its discretion, will see that the thing to be delivered in this country does not leave this country, so as to defeat the right of the plaintiff to have it so delivered" <sup>(1)</sup>.

Injunction  
against  
removal of  
ship.

Before the Judicature Act, the general rule was that time was of the essence of a contract at Common Law, but not of the essence of a contract in the Court of Equity. Sect. 25, sub-sect. 7 of the Judicature Act, 1873, now provides that stipulations in contracts as to time or otherwise, which would not, before the commencement of this Act (Nov. 2, 1875), have been deemed to be or to have become, of the essence of such contract in a Court of Equity, shall receive in *all* Courts the same construction and effect as they would have heretofore received in equity.

Time will not be treated as of the essence of the contract unless it is made so—

Time of the  
essence of  
the con-  
tract.

1. By the express stipulation between the parties ;
2. By the nature of the property ; or
3. By surrounding circumstances <sup>(2)</sup>.

The following are some of the principal cases in which time has been considered the essence of the contract :—

Where the property in question was of a wasting character ; or of fluctuating value: *e.g.* a reversion ; a mining lease ; foreign stock of varying value. A life annuity ; a life estate. Contract for the supply of coal.

When the property was purchased for mercantile purposes : *e.g.* land purchased in order to erect a mill.

Where the purchaser required the property for an immediate purpose : *e.g.* for residence.

Where the vendors were beneficially interested, and were a fluctuating body : *e.g.* a dean and chapter.

<sup>(1)</sup> *Hart v. Hervig*, L. R. 8 Ch. 860.

<sup>(2)</sup> *Tilley v. Thomas*, L. R. 3 Ch. 61.

Time of the  
essence of  
the con-  
tract.

It has been held in several cases, that when a public-house is sold as a going concern, time is the essence of the contract <sup>(1)</sup>.

Where time is not originally of the essence of the contract, it may, as was pointed out by Lord St. Leonards, be made so if either party has been guilty of some default or unreasonable delay, by a distinct written notice fixing a reasonable time for the completion of the contract.

The Court has jurisdiction to give damages in addition to, or substitution for specific performance <sup>(2)</sup>.

Comprom-  
mise.

Before the Judicature Act the Court had jurisdiction specifically to enforce agreements to compromise. But here a material change of a beneficial character has been introduced by the Judicature Act, s. 24, which enables and directs the High Court to grant in all causes or matters before it, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided <sup>(3)</sup>.

Parties to  
actions.

The general rule, of course, is that parties to the contract are the only persons who need be parties to the action for specific performance. To this, however, an exception was established by a case decided more than fifty years ago <sup>(4)</sup>, viz. that a public

<sup>(1)</sup> *Day v. Lubke*, L. R. 5 Eq. 336; *Cowles v. Gale*, L. R. 7 Ch. 12; *Weston v. Savage*, 10 Ch. D. 736; and see Brett's Leading Cases in Modern Equity, where the authorities are collected under *Tilley v. Thomas*, p. 245. See also *Upperton v. Nickolson*, L. R. 6 Ch. 436.

<sup>(2)</sup> See *Sayers v. Collyer*, 28 Ch. D. 103, where it was held that the repeal of Lord Cairns Act (21 & 22 Vict. c. 27) by 46 & 47 Vict. c. 49, has not affected the jurisdiction of the Court in this respect. In a very recent case the Court of Appeal gave damages for breach of an agreement entered into by A with B, that B would enter into an agreement for a lease with A's landlord at a given rent for such term, and subject to such costs as the landlord should approve, and that upon the lease being granted A should surrender

his lease: *Foster v. Wheeler*, 38 Ch. D. 130. The jurisdiction to give damages in addition to or substitution for specific performance, has not been extended to cases where specific performance could not possibly have been directed. Accordingly the contract having from lapse of time become at the hearing incapable of specific performance, the equitable doctrine of part performance (as avoiding the operation of the Statute of Frauds) did not enable the plaintiff to obtain relief in damages: *Lavery v. Pursell*, 39 Ch. D. 508.

<sup>(3)</sup> See *Eden v. Naish*, 7 Ch. D. 781.

<sup>(4)</sup> *Edwards v. Grand Junction Railway Co.*, 1 M. & C. 98, and see Fry on Specific Performance, p. 98, *et seq.*

company after incorporation may be sued for the specific performance of contracts entered into before the passing of its Act by the promoters. The principle on which the Court proceeds is that the fact of the company "having passed from the chrysalis to the butterfly state" ought not to create any difficulty as to enforcing a contract, and that the company has taken the place of the promoters (see, as to Companies and Promoters, *post*, pp. 613, 615).

Parties to  
actions.

"The question," said Lord Cottenham, "is not whether there be any binding contract at law, but whether this Court will permit the company to use their powers under the Act in direct opposition to the arrangement upon the faith of which they were permitted to obtain such powers."

"As the company stand in the place of the projectors they cannot repudiate arrangements into which such projectors had entered."

A very considerable number of cases in which actions for specific performance would formerly have been necessary may now be disposed of by summons, under sect. 9 of the Vendor and Purchaser Act, 1874. That section provides that a vendor or purchaser of real or leasehold estate, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a Judge of the Court of Chancery in chambers in respect of—

Vendor and  
Purchaser  
Act, 1874.

(1.) Any *requisitions* or *objections* ; or

(2.) Any *claim for compensation* ; or

(3.) Any *other question arising out of or connected with the contract* (not being a question affecting the existence or validity of the contract).

And the Judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

"The object of the Legislature," as was stated in the leading case on this subject <sup>(1)</sup>, "was to enable either vendor or purchaser to obtain the decision of the Court upon *some isolated point* instead of being compelled to have recourse to the whole machinery which would be put in motion by an action or suit for specific performance."

(1) *In re Hargreaves and Thompson's Contract*, 32 Ch. D. 454, *et seq.*; and see Brett's Leading Cases in Equity, p. 91, where the cases are collected. It was laid down in a very recent case that any misdescrip-

tion in particulars of sale which would support an action of rescission, cannot be determined on summons under this Act: *In re Davis and Cavey*, 40 Ch. D. 601.

Thus in the case to which we have previously alluded, the owner of a certain property had agreed to sell it, and a question arose whether the minerals under a portion of the property were his at all, or whether they belonged to the lord of the manor <sup>(1)</sup>.

In another case a large part of the property contracted to be sold consisted of heath land, and an objection was raised that the would-be vendor had no right to the soil of the heath land, but only a right of pasturage over it. Under the old system in both these cases an action or suit for specific performance would have been necessary, but both were decided in a cheap and summary manner by a summons under the Vendor and Purchaser Act, 1874 <sup>(2)</sup>.

Practice.

The practice is to take out an originating summons, which is to be intituled in the matter of the contract and in the matter of the Vendor and Purchaser Act, 1874, and it is not unusual for the parties to agree upon a short written statement of facts which is signed by the solicitor for the parties, and a copy of which is left at chambers either before or after the return of the summons <sup>(3)</sup>. The summons may be heard in chambers, or, as is the more usual practice, adjourned into Court. Jessel, M.R., adopted the practice where the title was good and the purchaser desired it, of delivering judgment in open Court, though the question had been argued in chambers <sup>(4)</sup>.

Appeal.

The time for appealing is twenty-one days from the date of simple refusal, or from the date of the perfection of the order <sup>(5)</sup>.

Jurisdiction.

The Court has jurisdiction under this section not only to decide any question of the classes enumerated in the section, viz. all questions arising out of the contract, except such as affect the existence or validity of the contract itself, but also to make any order which would be just as the natural consequence of its decision. This principle was established by the first of the cases mentioned above <sup>(6)</sup>, where the Court ordered payment of interest on the deposit, and the purchaser's costs of investigating the title.

<sup>(1)</sup> *In re Hargreaves and Thompson's Contract*, 32 Ch. D. 454, and see *Re Terry and White's Contracts*, 32 Ch. D. 14.

<sup>(2)</sup> *In re Burroughs, Lynn and Sexton's Contract*, 5 Ch. D. 601.

<sup>(3)</sup> Daniell's Chancery Practice, p. 1382.

<sup>(4)</sup> *Coleman v. Jarrou*, 4 Ch. D.

165.

<sup>(5)</sup> *In re Blyth and Young*, 13 Ch. D. 416.

<sup>(6)</sup> *In re Hargreaves and Thompson's Contract*, 32 Ch. D. 454. See *In re Bryant and Barningham's Contract*, 44 Ch. D. 218, and notes on question there raised, 25 Law Journal, 616.

The reader who desires further information on the difficult subject of specific performance is referred to Fry on Specific Performance, 2nd ed., *passim*; Seton on Decrees, p. 1285, *et seq.*; Bowen on Specific Performance; notes to *Cuddee v. Rutter*; *Lester v. Foxcroft*; *Seton v. Slade*, White and Tudor's Leading Cases; notes to Brett's Leading Cases in Equity, p. 94; Dart's Vendors and Purchasers, 6th ed., p. 1103, *et seq.*; Clerke and Humphreys on Sales of Lands, p. 351, *et seq.* <sup>(1)</sup>.

Reference  
to autho-  
rities.

<sup>(1)</sup> The practice on motions for judgment in specific performance actions was considered in the two recent cases of *De Jongh v. Newman*, 56 L. T. (N.S.) 180, and *Eagley v. Searle*, 56 L. T. (N.S.) 306. In *Holmes v. Shaw*, 52 L. T. (N.S.) 797, Kay, J., had held that upon a motion for judgment in default of pleading in an action for specific performance

of an agreement, the agreement must be verified by affidavit. The difficult question of the specific performance of covenants for the renewal of leases was considered in *Gas Light and Coke Co. v. Towse*, 35 Ch. D. 519; and see as to judgment where defendant did not appear: *Stone v. Smith*, 35 Ch. D. 188.

## CHAPTER VII.

## INJUNCTION.

It has been deemed advisable to consider the law with reference to injunction in that portion of this work which is concerned with the business specially assigned to the Chancery Division. True it is that an injunction may be granted by any division of the High Court, but it is also equally true that applications for injunction are almost always made to the Chancery Division, and that the rules upon which the Court proceeds in granting or refusing injunctions are rules which have been laid down almost exclusively in Courts of Equity. In establishing these rules the Court proceeded on the principle of never abandoning any jurisdiction which it had once obtained, and at the same time of steadily increasing its jurisdiction in accordance with the various requirements of advancing society and the alterations which were made from time to time by the Statute law.

## Definition.

An injunction was formerly a *writ* issuing by order and under seal of a Court of Equity, but now by Order L., r. 11, the writ of injunction is abolished, and "an injunction shall be by a judgment or order, and any such judgment or order shall have the effect which a writ of injunction previously had." So that an injunction may now be defined as a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing <sup>(1)</sup>. Its function is, however, as pointed out by Mr. Kerr, far oftener preventive than restorative <sup>(2)</sup>.

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<sup>(1)</sup> Kerr on Injunctions, 3rd ed. p. 9.

<sup>(2)</sup> Injunctions were under the old practice either *special* injunctions, by which parties were restrained from doing such acts, or *common* injunctions as they were called, restraining proceedings in other Courts: see Kerr on Injunctions, *Second* ed. Chap. viii. A great change was introduced by the Judicature Act, 1873, s. 24, sub-s. 5, which enacted that no cause or proceeding in the

High Court of Justice or before the Court of Appeal should be restrained by prohibition or injunction; but that any matter of Equity might be relied upon by way of defence, or the party might apply to the Court by motion in a summary way for a stay of proceedings; and see *Besant v. Wood*, 12 Ch. D. 605, 630, where it was decided that, though pending proceedings cannot be restrained, a person may be restrained from instituting proceedings.

Injunctions at the present day are either provisional or "interlocutory," as they are called (*i.e.* injunctions granted in the course of proceedings until the hearing of the action, or until further order), or final or perpetual injunctions concluding rights of the parties which form part of the judgment made at the hearing of the action.

Different kinds of injunctions.

Another division of injunctions to which allusion has been previously made is that they are either prohibitive, *i.e.* prevent a particular thing from being done, or mandatory.

The principle upon which the Court proceeds in granting a mandatory injunction is not to order the performance of a positive act, but to direct that things should be restored to their former condition. As a general rule the jurisdiction is exercised with caution, comparative convenience and inconvenience are taken into account, and if pecuniary compensation be sufficient, while the inconvenience to the other party would be serious, the Court will not grant a mandatory injunction. Unreasonable delay is fatal to the application, but if the act complained of is continued after clear and distinct notice, the power of the Court to restrain the offender will be more freely exercised <sup>(1)</sup>.

The Court has said over and over again that no advantage is to be gained by hurrying on work. "Whatever a defendant erects after the commencement of the action or after notice that an action will be brought is subject to the control of the Court" <sup>(2)</sup>.

The following are instances in which mandatory injunctions have been granted, *viz.* against allowing obstructive buildings to remain, compelling the removal of obstructions to the flow of water for the use of flues, to the right of navigating a canal, against allowing pipes to remain on land <sup>(3)</sup>.

"The Court will rarely interfere to pull down a building which has been erected without complaint" <sup>(4)</sup>.

The 25th section of the Judicature Act, 1873, sub-sect. 8, provides that "a mandamus or an injunction may be granted, or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, and any such order

Provisions of Judicature Act.

<sup>(1)</sup> Kerr on Injunction, 3rd ed., p. 50, *et seq.*, where the authorities are collected.

<sup>(2)</sup> *Smith v. Day*, 13 Ch. D. 652.

<sup>(3)</sup> A mandatory injunction is seldom granted until the plaintiff has completely established his right, un-

less the injury will be irreparable, or unless defendant after express notice or pending litigation continues to push on an obstructive building: *Seton on Decrees*, vol. i. pp. 178, 179.

<sup>(4)</sup> Per Thesiger, L.J., *Gaskin v. Balls*, 13 Ch. D. 329.

Effect of  
Judicature  
Act.

may be made either unconditionally, or upon such terms and conditions as the Court shall think just" (1).

There was no inconsiderable amount of uncertainty as to what was the precise effect of these sweeping words (2), but their meaning has been recently interpreted by several decisions of the Court of Appeal (3), and the great principles upon which the Courts now proceed in granting injunctions may now be considered as settled. It must be just as well as convenient that the Court should interfere by injunction, and what is just and right must be decided not by the caprice of the judges, but according to sufficient legal reasons or on settled legal principles (4).

"All that was done," said the Court of Appeal, "by this section" (sect. 25, sub-sect. 8, Judicature Act, 1873), "was to give to the High Court power to give a remedy which formerly would not have been given in that particular case, but still only a remedy in defence of, or to enforce rights which, according to law, were previously existing and capable of being enforced in some or one of the different divisions which are now united in the High Court. The sole intention of the section is this, that where there is a legal right which was, independently of the Judicature Act, capable of being enforced either at law or in equity,

(1) The section goes on to provide that "if an injunction is asked either before, or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court shall think fit, whether the person against whom such injunction is sought, is or is not in possession, under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable." See *Loundes v. Bettie*, 33 L. J. Ch. 451; *Standford v. Hurlstone*, 9 Ch. 116; Kerr on Jurisdiction, 115 *et seq.* (3rd edition); as to the old practice: *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275, 286; *Smith v. Brown*, 48 L. J. Ch. 694.

(2) *Beddow v. Beddow*, 9 Ch. D. 89; *Hedley v. Bates*, 13 Ch. D. 498; *Aslatt v. Corporation of Southampton*, 16 Ch. D. 143; *Stannard v. Vestry of St. Giles, Camberwell*, 20 Ch. D. 190.

(3) *Day v. Brownrigg*, 10 Ch. D.

294; *Gaskin v. Balls*, 13 Ch. D. 324; *North London Railway Co. v. Great Northern Railway Co.*, 11 Q. B. D. 30.

(4) In old days the granting an injunction varied to a great extent with the disposition of the Lord Chancellor for the time being, so that it was quaintly said that the jurisdiction changed like the length of the Lord Chancellor's foot. Now, however, the jurisdiction is regulated by "settled principles." The "vir bonus," according to whose *arbitrium* the law is to be administered, is *qui praecepta patrum qui leges juraque servat*. A great orator and philosopher has well pointed out the evils of an "Unprincipled facility of change 'as often and as much and in as many ways as there are floating fancies and fashions.' The whole chain and continuity of the commonwealth would be broken. No one generation would link with another; men would become little better than the flies of summer." —Burke on the French Revolution, p. 110.



then, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right."

If there is either a legal or an equitable right which is being interfered with, or which the Court is called upon to protect, and the circumstances do not render it inconvenient or unadvisable to interfere, but render it convenient and advisable to interfere, the Court may protect that right by giving the remedy which previously would not have been given, namely, an injunction<sup>(1)</sup>.

To attempt to review the law as to injunction would be of course impossible within our present limits. Attention may however be directed to some of the leading cases in which the Court interferes by injunction, and the reader who desires further information may then be advised to consult the treatises mentioned on p. 598.

The law with regard to the publication of letters was established nearly 150 years ago in the case of *Pope v. Curl*. In that case the celebrated poet Pope obtained an injunction to restrain a bookseller from selling a book entitled *Letters from Swift, Pope, and others*, and Lord Hardwicke laid down the principle that the receiver of a letter had at most a joint property with the writer, and no license thereby to publish it to all the world.

The previous authorities on this subject were considered in a case which came before the Court<sup>(2)</sup>. Unhappy differences had arisen between Lord Lytton, the well-known novelist and dramatist, and Lady Lytton, and they had separated very many years before. The present Lord Lytton had published a life of his father, and Lady Lytton's executrix had announced her intention of publishing the letters belonging to the late Lady Lytton. It was held that as the publication of the letters was not necessary for the vindication of Lady Lytton's character their publication must be restrained.

The subject of the jurisdiction of the Court in granting injunctions is property and the maintenance of civil rights. The Court therefore has no jurisdiction as to matters criminal or immoral which do not affect property or civil rights<sup>(3)</sup>.

On this ground it was formerly held, though the law as we shall see has been altered on this point, that the Court had no

(1) *North London Railway Co. v. Great Northern Railway Co.*, 11 Q. B. D. 30.

(2) *Earl of Lytton v. Devey and Swan Sonnenschein & Co.*, 52 L. T. 121.

(3) In the *Briton Medical and*

*General Life Assurance Association Case*, 32 Ch. D. 503, the Court, acting under the powers conferred by the Companies Act, 1862, restrained proceedings of a quasi criminal character to recover penalties.

jurisdiction in cases of libel. The Court also declines to interfere in matters political or with the public duties of any department of Government.

Libel.

The law as settled by the older authorities, after some vacillation, was that there could be no injunction to restrain a libel. But now it is clearly established that there is such a jurisdiction <sup>(1)</sup>. In a well-known recent case <sup>(2)</sup> a solicitor, acting for some shareholders in a company, printed and circulated, but only among the shareholders, a circular which reflected very strongly on the mode in which the company had been brought out and on the conduct of the promoters and directors. Under these circumstances an interlocutory injunction was granted by the judge of first instance. It was held by the Court of Appeal that there was jurisdiction to restrain a libel on interlocutory application, but that the jurisdiction ought to be exercised with great caution, more especially in a case when the communication being *prima facie* privileged (*ante*, p. 469), was therefore not actionable unless express malice could be proved, and accordingly in this case the order for an injunction was discharged <sup>(3)</sup>.

Light.

Very many and very interesting are the cases which have come before the Courts from time to time on the question concerning the obstruction of lights.

The right to light is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used, and the blessing and comfort of the entry of the direct rays of the sun. Prior to the celebrated case of *Tapling v. Jones* (11 H. L. C. 290), there was some doubt whether the alteration of a building did not entail the loss to a right to light, but the law may now be taken as settled by that decision.

This case established that a man by adding new windows to his property did not lose his right to the access of light through the old windows, and, as was said in a recent case, applying reason to work out the logic of that decision, it must follow that a man may lessen his light without losing anything. A man by blocking up a part of old lights and adding new windows does not lose his right to so much of the old light as is not so blocked up <sup>(4)</sup>.

There is no conclusion of law or necessary inference of fact

<sup>(1)</sup> *Prudential Assurance Co. v. Knott*, 10 Ch. 142; *Saxby v. Easterbrook*, 3 C. P. D. 339; *Thomas v. Williams*, 14 Ch. D. 864; *Thorley's Cuttle Food Co. v. Massam*, 6 Ch. D. 652.

<sup>(2)</sup> *Quartz Hill Consolidated Gold*

*Mining Co. v. Beall*, 20 Ch. D. 501.

<sup>(3)</sup> See also *Hayward & Co. v. Hayward & Sons*, 34 Ch. D. 198. Oral slander was restrained in *Hermann Loog v. Bean*, 26 Ch. D. 306.

<sup>(4)</sup> Per judgment of Bowen, L.J. in *Scott v. Pape*, 31 Ch. D. 573.

that a building will not obstruct the light coming to a window if it permits the light to fall on the window at an angle of not less than 45° from the vertical, and the question of obstruction is to be determined by the evidence in each case <sup>(1)</sup>.

The Court will take into consideration the circumstances, *ex. gr.* that the property is situated in the centre of London <sup>(2)</sup>.

The general rule is that a mortgagee will not be restrained by injunction from exercising his power of sale, if he exercises it *bonâ fide*, unless there be fraud or some special contract. Mortgage.

The injunction, moreover, will not be granted except on the terms of the mortgagor paying into Court the sum which the mortgagee swears to be due for principal, interest and costs, but this does not apply where the Court can see on the terms of the deed that the amount claimed cannot be due on the security <sup>(3)</sup>; or when the mortgagee was, at the time of taking the security, solicitor to the mortgagor <sup>(4)</sup>. In an action by an equitable mortgagee for sale or foreclosure, the Court granted an injunction restraining the mortgagor from dealing with the legal estate, there being ground for believing that he intended to part with the legal estate, *pendente lite* <sup>(5)</sup>.

In a case which came before the late Master of the Rolls—Sir George Jessel—an hotel with its good-will and licence had been legally mortgaged. The mortgage-money and rent were both in arrear; the landlord distrained, and the mortgagee bought in the goods from the landlord at the condemned price. The mortgagee attempted to put a man in possession, but the mortgagor took the law into his own hands and turned him out. The mortgagee thereupon acting, as the judge said, very wisely, instead of getting a force of navvies to put the man in possession, applied to the Court for a receiver and an injunction, and succeeded in his application <sup>(6)</sup>.

What is a nuisance? It has been defined by a well-known writer as an act unaccompanied by trespass which causes a substantial injury to the corporeal or incorporeal hereditament of other persons. Nuisance may be either public or private. Nuisance.

<sup>(1)</sup> See further on the subject of light: *City of London Brewery v. Tennant*, L. R. 9 Ch. 212; *Hackett v. Baiss*, L. R. 20 Eq. 494; *Theed v. Debenham*, 2 Ch. D. 165; *Holland v. Worley*, 26 Ch. D. 578.

<sup>(2)</sup> *Scott v. Pape*, 31 Ch. Div. 554, where the previous authorities are collected; *Harris v. De Pinna*, 33 Ch. D. 238; *Greenwood v. Hornsey* 33 Ch. D. 471.

<sup>(3)</sup> *Hickson v. Darlow*, 23 Ch. D. 690.

<sup>(4)</sup> *MacLeod v. Jones*, 24 Ch. D. 289, 297.

<sup>(5)</sup> *London and County Banking Co. v. Lewis*, 21 Ch. D. 490.

<sup>(6)</sup> *Truman & Co. v. Redgrave*, 18 Ch. D. 547, 550, where the form of order appointing a receiver and manager with an injunction is given.

The distinction between the two cases is, that a private nuisance is an injury to the property of an individual, while a public nuisance is an injury to the property of all persons who come within the sphere of its operation <sup>(1)</sup>.

The nature of the interference with personal comfort, which will be regarded by the Court as serious enough to justify its interference by injunction, was stated by Vice-Chancellor Knight-Bruce in a well-known judgment <sup>(2)</sup>. "There must," he said, "be an inconvenience materially interfering with the ordinary comfort physically of human existence—not merely according to elegant and dainty modes and habits of living; but according to plain and sober and simple notions among the English people." A man, as was said in a very recent case, electing to reside in a town, and particularly in such a place as the metropolis, must be taken to have submitted to certain annoyances from which he would have been free if living in the country, as he has elected to come to a city of noises <sup>(3)</sup>.

Patent.

"The Court can grant an interlocutory injunction before the hearing where the patent is an old one, and the patentee has been in long and undisturbed enjoyment of it, or where its validity has been established elsewhere, and the Court sees no reason to doubt the propriety of the result, or where the conduct of the defendant is such as to enable the Court to say that as against the defendant himself there is no reason to doubt the validity of the patent" <sup>(4)</sup>. (See as to threats of legal proceedings, *ante*, p. 300.)

Photo-graphs.

In a case which came before the Court in 1888, a photographer, who had taken a negative likeness of a lady to supply her with copies for money, was restrained by injunction from selling or exhibiting copies.

The grounds on which this decision was based, were stated in the judgment as follows:—

"The customer who sits for the negative thus puts the power

<sup>(1)</sup> *Soltau v. DeHeld*, 2 Sim. (N.S.) 142; and see further on the subject of nuisances, Kerr on Injunction, 3rd ed., p. 166, *et seq.*; Seton on Decrees, 222, *et seq.*; *Ball v. Ray*, L. R. 8 Ch. 467; *Bailard v. Tomlinson*, 29 Ch. D. 113. In a very recent case in the House of Lords (*Fleming v. Hislop*), 11 App. Cas. 697, where the Court held that an injunction ought not to be awarded so strictly as to shut out all scientific attempts to attain the desired end without causing a nuisance, a definition of nuisance was cited with approval, "that anything

which makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction," but it was also said *lex non favet delicatorem votis*; see also as to nuisance, p. 479, *ante*.

<sup>(2)</sup> *Walter v. Selfe*, 4 De G. & Sm. 322.

<sup>(3)</sup> *Fanshawe v. London Provincial Dairy Co.*, Times' Reports, vol. iv. p. 694, citing *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

<sup>(4)</sup> Per Jessel, M.R., in *Dudgeon v. Thomson*, 30 L. T. (N.S.) 244; S. C., 22 W. R. 464.

of reproducing the object in the hands of the photographer; and in my opinion, the photographer who uses the negative to produce other copies for his own use without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and, further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only" (1).

Covenants in restraint of trade within the reasonable limits which the law allows, are enforced by injunction. It has been long established that covenants in general restraint of trade are bad on grounds of public policy (2). In a case decided in 1888 (3), where a bond was given to pay a certain sum as liquidated damages if the obligor took service within a certain distance of his employer, it was enforced by injunction, and the obligor was not allowed to get free from his contract by paying the sum of money which had been named as liquidated damages.

Restraint  
of trade.

The Court also interferes by injunction to enforce what are called restrictive or negative covenants, *i.e.* covenants not to use property in a particular manner, *e.g.* not to build any houses, except of a particular description, on the land. One of the leading cases on this subject was the Leicester Square case of *Tulk v. Moxhay* (4), where it was decided that such a covenant would be enforced against all subsequent purchasers for value.

Restrictive  
covenants.

The further development of this doctrine may be illustrated by a case which was commented on in the House of Lords in 1888.

In this case, a Mr. Stratton had taken a building lease of two plots of ground in the Isle of Wight. There was a restrictive covenant in respect of plot A, with the object of preserving an uninterrupted view of the sea for the benefit of houses to be erected on plot B. Stratton granted an underlease of plot B. During the negotiations for the underlease, he had told the

(1) Per North, J., in *Pollard v. Photographic Co.*, 40 Ch. D. 345, 349.

(2) See *Mitchell v. Reynolds*, Smith's Leading Cases; *Mallan v. May*, 11 M. & W. 665; *Allsopp v. Wheatecroft*, L. R. 15 Eq. 59; *Rousillon v. Rousillon*, 14 Ch. D. 351; *Vernon v. Hallam*, 34 Ch. D. 748; *Davies v. Davies*, 36 Ch. D. 359; *Palmer v. Mallett*, 36 Ch. D. 411; *Mineral Water Co. v. Booth*, 36 Ch. D. 465; and see as to question whether the

vendor of the goodwill of business will be restrained from soliciting customers: *Pearson v. Pearson*, 27 Ch. D. 145, and notes thereto, Brett's Leading Cases in Equity.

(3) *National Provincial Bank of England v. Marshall*, 40 Ch. D. 112.

(4) See for the further cases on subject, *Austerberry v. Corporation of Oldham*, 29 Ch. D. 750, and notes, Brett's Leading Cases in Equity.

underlessee that he was prevented by the terms of his lease from building so as to obstruct the sea view. On this assurance, the underlease was taken, and villas were built, which were afterwards acquired by a Mr. Piggott. Stratton then went to the lessor and surrendered his lease for the purpose of getting rid of the restrictive covenant. The Court decided that, as what was said by Stratton was intended to be understood, and was in fact understood, as an assurance that he had no power to obstruct the sea view during the currency of the lease, the obligation of the covenant still remained <sup>(1)</sup>.

Specific  
perform-  
ance.

An injunction is sometimes granted to restrain the breach of a negative stipulation when specific performance of the contract would not be granted. The leading case on this point is *Lumley v. Wagner* <sup>(2)</sup>, decided by Lord St. Leonards in 1852.

In that case the contract was that Mdle. Wagner would sing three months at Her Majesty's Theatre in London. That was the substantial and affirmative portion of the contract between the parties. The negative portion of the contract was that she would not "use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorization of Mr. Lumley." Of course, as was pointed out in a subsequent case, Mdle. Wagner could not be always singing, and therefore the contract necessarily stated some limits as to how often she was to sing, but when she did sing during the three months she was to sing at Her Majesty's Theatre; the negative terms were that during the three months she would not sing anywhere else than at Her Majesty's Theatre.

The Court proceeded on the principle that the affirmative and negative stipulations of the agreement were co-extensive, and formed in truth but one contract, and granted the injunction to prevent the violation of the negative stipulations.

The Court will not interfere by injunction to restrain the breach of a contract for the sale and delivery of chattels which it could not specifically perform <sup>(3)</sup>; but in a recent case <sup>(4)</sup> the Court granted an injunction to enforce an express negative stipulation not to sell to any other manufacturers, although the contract was one of which specific performance would not have been granted.

Trustee.

A trustee may not use his powers except for the legitimate purposes of the trust, and he will be restrained by injunction

<sup>(1)</sup> *Piggott v. Stratton*, considered in *Spicer v. Martin*, 14 App. Cas. 12.

<sup>(2)</sup> 1 De G. M. & G. 604.

<sup>(3)</sup> *Fothergill v. Rowland*, 17 Eq. 132.

<sup>(4)</sup> *Donnell v. Bennett*, 22 Ch. D. 835.

from any improper use of his powers. If a breach of trust be threatened by a trustee it is the duty of another trustee to apply for an injunction to restrain him. A mere stranger to the trust cannot, however, bring an action. In a well-known case, this principle was carried still further, and an injunction was granted restraining a trustee and a purchaser from completing a contract which contained an unnecessarily depreciating condition as to title, but the law has now been materially altered on this point <sup>(1)</sup>.

The subject of waste has already been considered (*ante*, pp. 27 Waste. to 29). A particular and unusual form of waste called "ameliorating waste," that is waste which so far from doing injury to the inheritance improves it, occupied the attention of the Court in a case which was decided in 1878. In that case a lessee considered that it would be beneficial to convert certain store buildings which had fallen into disrepair into dwelling houses, which would much increase their value, and was proceeding to so convert them. The lessor applied for an injunction, but the House of Lords considered that though that which had been done might in the eye of common law be waste, still it was that kind of waste which fell within the denomination of ameliorating waste, and that an injunction must be refused.

It has been decided <sup>(2)</sup> that where an illegal act such as interference with a public highway or a navigable stream tends to the injury of the public, the Attorney-General may maintain an action without proof of any actual injury. The Public Health Act, 1875, however, confers none of the powers of an Attorney-General on a local board, and it cannot take proceedings on its own account unless it is specially injured <sup>(3)</sup>.

An application is often made for service of notice of motion along with the copy of the writ. This is done because it would be irregular that notice of motion in an action should be served on a defendant before he had appeared to the writ.

The following is the usual form of notice of motion for an injunction :— Notice of motion.

Take notice that this Court will be moved before his lordship, Mr. Justice            on Tuesday the            day of            next by Mr.            as counsel on the part of the plaintiff, that the defendant B., his officers, servants, and workmen, etc., may be restrained by the order and injunction of this Honourable Court

<sup>(1)</sup> *Dance v. Goldingham*, L. R. 752.  
8 Ch. 903, see *ante*, p. 78.

<sup>(2)</sup> *Attorney-General v. Shrewsbury* <sup>(3)</sup> *Attorney-General v. Acton*  
(*Kingsland*) *Bridge Company*, 21 Ch. D. Local Board, 22 Ch. D. 221.

from continuing to erect or raise the walls or building now in course of erection by the defendant to the of plaintiff's premises, situate at to a greater height than the said wall or building now is, until the trial of this action or further order.

And also take notice that by special leave of the Court this notice is served together with the writ of summons in the action.

Dated, etc.

Form of  
order.

The form in which the Court issues its injunction may be illustrated by an order restraining equitable waste.

Upon motion this day and upon reading the affidavit of A. B. and the affidavit of C. D., this Court doth order that the defendant D., her servants, workmen, and agents, be restrained from cutting down any timber or other trees growing on the estate in the pleadings mentioned which are planted or growing thereon for the protection or shelter of the several mansion-houses belonging to the said estate, or for the ornament of the said houses, or which grow in lines, walks, vistas or otherwise for the ornament of the said houses, or of the gardens, or parks, or pleasure-grounds thereto belonging; And also that the defendant, her servants, workmen and agents be restrained from cutting down any timber or other trees, except at seasonable times, and in a husband-like manner; and likewise from cutting down saplings and young trees not fit to be cut as and for the purpose of timber until further order <sup>(1)</sup>.

An injunction may be obtained either *ex parte*, i.e. without notice, or on notice to the opposing party. If the application be made *ex parte*, there must be full disclosure to the Court, and if the order of the Court has been obtained by misrepresentation, it may be dissolved at once, even though it is about to expire <sup>(2)</sup>.

Except in cases where the right to the injunction is perfectly clear, the applicant for the injunction is put on terms to abide by any order that the Court may afterwards make as to damages <sup>(3)</sup>. An undertaking as to damages is not confined

<sup>(1)</sup> Seton on Decrees, p. 185.

<sup>(2)</sup> *Wimbledon Local Board v. Croydon Rural Sanitary Authority*, 32 Ch. D. 421. See as to giving notice of injunction, *Re Bryant*, 4 Ch. D. 98; *Re Bishop*, 13 Ch. D. 180.

<sup>(3)</sup> Seton on Decrees, 173, 174: Whenever the usual undertaking as to damages is given and the plaintiff ultimately fails, an inquiry as to

damages may be directed and will be directed in the absence of special circumstances, even though the plaintiff was not guilty of any misrepresentation, suppression or other default in obtaining the injunction: *Griffith v. Blake*, 27 Ch. Div. 474, 477, dissenting from the dictum of the late Sir George Jessel in *Smith v. Day*, 21 Ch. D. 421.



to damages sustained by the person against whom the injunction is granted <sup>(1)</sup>.

The Court has jurisdiction to give damages in addition to or substitution for injunction <sup>(2)</sup>.

The reader who desires further information on the extremely extensive subject of Injunction, is referred to Kerr on Injunction, *passim*; Joyce on Injunctions; Seton on Decrees, p. 171, *et seq.*; Brett's Leading Cases in Equity, p. 324, *et seq.*

Reference  
to autho-  
rities.

Before leaving the subject of injunction we must glance briefly at the law as to interference by the Court with clubs. The general principle is that the Court will not interfere with the decision of the committee of a club. The only questions which it will determine are whether the rules of the club have been observed, whether anything has been done contrary to natural justice, and whether the decision has been contrary to natural justice <sup>(3)</sup>.

In a very recent case the Court declined to grant an injunction against the proprietor and secretary of the committee of a proprietary club, on the ground that the member had no right of property in the club <sup>(4)</sup>.

(1) *Tucker v. New Brunswick Trading Co. of London*, 44 Ch. D. 249.

(2) See *Sayers v. Collyer*, 28 Ch. D. 103, where it was held that the repeal of Lord Cairns' Act (21 & 22 Vict. c. 27) by 46 & 47 Vict. c. 49, has not affected the jurisdiction of the Court in this respect: *Dreyfus v. Peruvian Guano Co.*, 43 Ch. D. 316.

(3) *Fisher v. Keane*, 11 Ch. Div.

353; *Labouchere v. Earl of Wharncliffe*, 13 Ch. Div. 346; *Dawkins v. Autrobus*, 17 Ch. Div. 615.

(4) *Baird v. Wells*, 44 Ch. D. 661, following *Forbes v. Eden*, Law Rep. 1 H. L. Sc. 568, 581, and *Rigby v. Connol*, 14 Ch. Div. 482, 487; and see as to the law with regard to clubs, Club Law by J. D. Daly.

## CHAPTER VIII.

## RECTIFICATION.

Principle.

The principle upon which the Court proceeds in rectifying instruments is to carry out the intention of the parties <sup>(1)</sup>.

Result of authorities.

The result of the authorities on the subject has been summed up by a well-known text-writer, as follows: "There can be no rectification if the mistake be not mutual or common to all parties to the instrument, or if one of the parties knew of the mistake at the time he executed the deed. Where one party only has been under a mistake, while the other, without fraud, knew what the character of the deed was, and intended that it should be, the Court cannot interfere, for otherwise it would be forcing on the latter a contract he never entered into, or depriving him of a benefit he had *bonâ fide* acquired by an executed deed. Rectification can only be had where both parties have executed an instrument under a common mistake, and have done what neither of them intended, if mistake on one side may be a ground for rescinding, but not for correcting or rectifying an agreement" <sup>(2)</sup>.

Marriage articles.

Allusion has already been made (*ante*, p. 513) to Marriage Articles. Questions of rectification sometimes arise when there are discrepancies between the articles and the settlement. In such cases the Court proceeds upon the following principles.

When both the marriage articles and the marriage settlement are made *before* the marriage, the settlement will not in general be controlled by the articles, the Court proceeding on the principle, that as "all parties are at liberty, the settlement is to be taken as a new agreement" <sup>(3)</sup>.

Evidence is however admissible, to shew that the final agree-

<sup>(1)</sup> All causes and matters for the rectification, or setting aside, or cancellation of deeds or other written instruments, are assigned to the Chancery Division of the High Court of Justice, by the 34th section of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66).

<sup>(2)</sup> Kerr on Mistake, 2nd ed. p. 498.

<sup>(3)</sup> *Legg v. Goldwire*, 1 White & Tudor's Leading Cases in Equity, vol. i. p. 17, last edition. See *Bold v. Hutchinson*, 5 De G. Mac. & G. 558, and as to a letter containing a promise to settle property, being superseded by a subsequent agreement for a settlement: *Re Badcock. Kingdon v. Tagert*, 17 Ch. D. 361, and cases there referred to.

ment of the parties was embodied in the articles, and that the discrepancy between the two instruments had its origin in mistake. In this case the Court will rectify the settlement, by making it conformable to the real intention of the parties as expressed in the articles.

Marriage  
articles.

It has, however, been laid down by a high authority (Lord Cottenham) that in order to justify the Court in taking such a course, it is necessary that a clear intention should be proved; it must be shewn that the settlement does not carry into effect the intention of the parties. If there be merely evidence of doubtful or ambiguous words having been used, "the settlement itself is the construction which the parties have put upon those doubtful or ambiguous words" <sup>(1)</sup>.

The Court, however, acts with caution in rectifying marriage settlements, and is strict in requiring evidence as to the exact nature of the contract into which the parties intended to enter, on the ground that it is impossible to undo the marriage or to replace the parties to the same positions as they were in before the marriage.

The law with regard to the subject of mistake was much considered in a recent case <sup>(2)</sup>. There the plaintiff wrote a letter offering to grant to the defendant a lease of a portion of a block of three houses, consisting of the first, second, third, and fourth floors of all three, at the rent of £500 a year, the defendant wrote in answer, accepting the offer; and a lease was executed whereby all the upper floors of the block were demised by the plaintiff to the defendant at the rent of £500. Mistake.

It then appeared that the plaintiff had made a mistake, having intended to reserve the first floor in one of these houses for his own use, and also that before the receipt of the plaintiff's letter, the defendant knew of this intended reservation, and the Vice-Chancellor held that this mistake warranted a rescission of the contract, and also that the defendant should not be allowed any costs, as he was not justified in his assertion that the letter constituted a new and independent offer. In the course of his judgment, Bacon, V.C., expounded the law on the subjects of rectification and rescission of contracts as follows:—

"If it is a case of *common mistake*—a common mistake as to one stipulation out of many provisions contained in a settlement or any other deed, that upon proper evidence may be rectified—the

<sup>(1)</sup> *The Marquis of Breadalbane v. The Marquis of Chandos*, 2 My. & Cr. 739.

<sup>(2)</sup> *Paget v. Marshall*, 28 Ch. D. 255.

Unilateral  
mistake.

Court has the power to rectify, and that power is very often exercised. In the other class of cases, *i.e.* cases of what is called *unilateral* mistake, if the Court is satisfied that the true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into."

Rectifica-  
tion of  
voluntary  
deeds.

The law with regard to the rectification of voluntary deeds is somewhat peculiar.

Equity will not as it is said assist a volunteer, and accordingly a voluntary deed cannot be rectified during the lifetime of the settlor unless he consents. If you say to a man there should be a trust in favour of A. B., and he says, "I intended no such thing, I do not choose to give anything to A. B.," no amount of evidence, however conclusive, proving that he did so intend, will at all justify the Court in compelling him to introduce a clause into the deed which he does not choose to introduce now, although he might at the time have wished to have done so <sup>(1)</sup>.

If, on the other hand, a man executes a voluntary deed in his lifetime declaring certain trusts, and happens to die, and it is afterwards proved, from the instructions or otherwise, that beyond all doubt the deed was not prepared in the exact manner which he intended, then the deed may be reformed, and those particular provisions necessary to carry his intention into effect may be introduced.

Disentail-  
ing deed.

It was decided by the Appeal Court in a recent case that a deed of re-settlement although enrolled in Chancery as a disentailing deed might be rectified <sup>(2)</sup>.

Evidence.

In all cases where the rectification of a deed is sought, the Court requires clear evidence of the intentions of the parties and of the fact that the mistake was mutual. The *onus probandi* rests upon the party who seeks to have the instrument rectified, and, as might naturally be expected, the Court views with some jealousy the evidence which is adduced to rectify an executory instrument, and its jurisdiction will be cautiously exercised <sup>(3)</sup>.

In one case the Court considered an uncontradicted affidavit of the plaintiff as sufficient evidence. The order of the Court

<sup>(1)</sup> *Broun v. Kennedy*, 33 Beav. 133; *Lester v. Hodgson*, L. R. 4 Eq. 32.

<sup>(2)</sup> *Hall-Dare v. Hall-Dare*, 31 Ch. D. (C.A.) reversing the decision

of the Vice-Chancellor, 29 Ch. D. 133.

<sup>(3)</sup> *Barrow v. Barrow*, 18 Beav. 522; *Wright v. Goff*, 22 Beav. 207.

rectifying the settlement is sufficient to revest the legal estate in the property in the proper party without a conveyance. The practice is to endorse the rectifying order of the Court on the instrument rectified, and such order is sometimes specially initialled by the judge <sup>(1)</sup>. Practice.

Although the subject of the rectifications of deeds, &c., has been specially assigned to the Chancery Division, yet it was decided soon after the Judicature Acts came into operation that where the defendant in an action in one of the other divisions of the High Court of Justice relies on an equity to have a deed set aside as part of his defence, the division in which the action is brought may give effect to such an equity, and may for that purpose treat the instrument in question as rectified or set aside <sup>(2)</sup>. Attention has already been directed (*ante*, p. 581) to the fact that since the Judicature Act the Court can now rectify an agreement, and order specific performance in the same action <sup>(3)</sup>.

<sup>(1)</sup> *White v. White*, L. R. 15 Eq. 247; *Hanley v. Pearson*, 13 Ch. D. 545, 549, where the form of order is given; *Tucker v. Bennett*, 38 Ch. D. 1, reversing 34 Ch. D. 754.

<sup>(2)</sup> *Mostyn v. The West Mostyn Coal and Iron Co., Limited*, 1 C. P. D. 145; *Hirschfield v. London. Brighton, and South Coast Railway Co.*, 2 Q. B. D. 4.

<sup>(3)</sup> *Olley v. Fisher*, 34 Ch. D. 367. See also on the subject of rectification: *Pearson v. Pearson*, 27 Ch. D.

145; *Caird v. Moss*, 33 Ch. D. 22; and as to mistake of fact and law: *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Beauchamp v. Winn*, L. R. 6 H. L. 223; *Rogers v. Ingham*, 3 Ch. D. 351; and notes Brett's Leading Cases in Equity, p. 64, *et seq.* In *Allcard v. Skinner*, 36 Ch. D. 145, where the authorities as to setting aside gifts are collected, the Court refused to interfere on the ground of *laches* and acquiescence.

## CHAPTER IX.

## INFANTS.

The law and practice with regard to the person and property of infants is of very great importance in proceedings in all divisions of the High Court (see *ante*, p. 386); but their chief consideration seems to fall with special appropriateness in that portion of this work which is devoted to equity, for the following reasons:—

Among the subjects specially assigned to the Chancery Division by sect. 34 of the Judicature Act, 1873, are the “Wardship of Infants and the care of Infants’ Estates.” It is also specially provided by sect. 25, sub-sect. 10 of the Judicature Act, 1873, that, “in questions relating to the custody and education of infants, the rules of equity shall prevail” <sup>(1)</sup>.

To this it may be added, that even in matters in practice, the Chancery Division is made to prevail, as the rules of the Supreme Court provide, “that infants may sue as plaintiffs by their next friends, in the manner heretofore practised in the Chancery Division, and may, in like manner, defend by their guardians appointed for that purpose” <sup>(2)</sup>.

Who then are infants? The Roman law fixed full age (*perfecta ætas*) at twenty-five, and drew distinctions between different points of time under that age. The English law fixes the age of majority at twenty-one; an age said to have been arrived at by allowing one year after the time when the youth was fit to carry heavy armour, and regards all persons below that age as infants. An infant attains his majority on the first moment of the day before his twenty-first birthday. Thus, if an infant were born on the 4th December, 1868, he would attain his majority on the first moment of the 3rd December, 1889.

The law with regard to infants, so far as the business of the

<sup>(1)</sup> It was, however, decided in *Re Goldsworthy*, 2 Q. B. D. 75, that the Queen’s Bench Division has a concurrent jurisdiction in matters relating to infants, but note, that appli-

cations under the Guardianship of Infants Act, 1886, are to be made to the Chancery Division.

<sup>(2)</sup> R. S. C. 1883, O. xvi. r. 16.

Chancery Division is concerned, may be considered under four heads:—

1. Actions by and against infants.
2. The property of infants.
3. The guardianship, custody, and religious education of infants.
4. The marriage of infants, and the settlement of their property.

An infant commences an action by his next friend, and defends by guardian *ad litem* <sup>(1)</sup>, and the Court has a power to direct an inquiry whether an action is fit and proper and is for the benefit of an infant, and it has also jurisdiction to stay the action or to remove the next friend and substitute another in his place <sup>(2)</sup>.

Actions by  
and against  
infants.

The principle on which the Court proceeds in matters relating to infants is, that in the absence of special circumstances to justify its interference, the rights of the father are paramount. This principle is well illustrated by a case <sup>(3)</sup> which came before the Court of Appeal in 1877; an action had been commenced by a next friend without any communication being made to the father, for the administration of an estate in which infants were entitled to large contingent benefits. A judgment for administration which seems to have been and was assumed by the Court of Appeal to have been in every way proper was obtained.

The father who had no interest adverse to his children, and against whom there was no imputation, applied to be substituted a next friend. The judge of the County Palatine of Lancaster refused the application, alleging as a ground, that there was no authority for the proposition that when an action was about to be instituted a communication must be made to the father. The Court of Appeal made an order substituting the father as next friend.

“The father,” said Sir George Jessel, “intervenes and says, ‘I am the natural guardian of my children. It is for me to consider in what way they should be maintained and educated, and it is for me to judge what is for their benefit both as regards their personal guardianship and the guardianship of their

<sup>(1)</sup> *Re Dawson*, 41 Ch. D. 415.

<sup>(2)</sup> See Seton on Decrees, where the authorities are collected, 4th ed. p. 710; Annual Chancery Practice, note to R. S. C. 1883, Order xvi.; see, as to compromise of infant's action, *Re Birchall*, 16 Ch. D. 41; *Rhodes v.*

*Swithenbank*, 22 Q. B. D. 579. An infant cannot be interrogated in an action: *Mayor v. Collins*, 24 Q. B. D. 361.

<sup>(3)</sup> *Woolf v. Pemberton*, 6 Ch. D. 19.

Father as  
next  
friend of  
infant.

estates. I am the proper person, therefore, to conduct this suit on their behalf, and I ask the Court under those circumstances, to intervene in my favour and substitute me as their next friend.' It appears to me it requires nothing more than to state these facts to shew the propriety of the application, and that it should have been acceded to."

"A man," the judge continued, "who has instituted proceedings in the Court of Appeal has no vested right to continue such proceedings, but the father has a vested right to look after the interests of his children." As, however, in the present case, the next friend had acted properly, the costs were made costs in the action (see *post*, p. 801).

The principle of this case was followed in another case where, though the father had authorised a stranger to act as next friend to his infant children, it was held that the mother, whom the father had by his will appointed as their guardian, had a right to remove the next friend and be substituted in his place <sup>(1)</sup>.

Fore-  
closure  
action.

In the case of a foreclosure action against an infant, it was an established rule under the old practice, and it is still usual, to insert in the judgment a clause allowing the infant six months after he comes of age to shew cause against the judgment, unless the infant is a trustee. When, however, a sale is directed instead of a foreclosure, the infant has no day to shew cause <sup>(2)</sup>.

Action for  
specific  
performance.

Attention has already been directed to the fact that as an infant cannot have specific performance of a contract enforced against him, so on the other hand he cannot enforce it. If, however, an infant contracts for the purchase of an estate and pays a deposit and then on attaining majority declines to complete, he cannot get back his deposit unless a fraud was practised upon him <sup>(3)</sup>.

It is a general principle that the Court has no authority to

<sup>(1)</sup> *Hutchinson v. Norwood*, 31 Ch. D. 237.

<sup>(2)</sup> Seton on Decrees, pp. 712, 713; Daniel's Chancery Practice, 6th ed. p. 177. In a recent case, *Wolverhampton and Staffordshire Banking Company v. George*, 24 Ch. D. 707, in which the Court was satisfied by evidence that the value of the property was not sufficient to pay the amount of the principal sum due on the mortgage, together with interest and the costs of the action (that in fact the property was not worth redeeming);

and where the plaintiff offered to pay the defendant's costs of the action, as between solicitor and client, the Court made a judgment for an immediate foreclosure absolute, as this was for the benefit of the infant. In *Mellor v. Porter*, 25 Ch. D. 158, the infant was ordered to convey on his attaining the age of twenty-one, and was given the usual time to shew cause.

<sup>(3)</sup> Sugden's Vendors and Purchasers, 14th ed. p. 209.



sell the real estate of an infant on the ground that it will be beneficial to him. Under the statutory powers however, which are conferred upon it by the Partition Acts, or where it is for the benefit of the infant that a sale should be directed in order that a claim or debt may be satisfied, the Court may order a sale <sup>(1)</sup>.

Among the cases which have been before the Courts in recent times the following may be mentioned as illustrating the law with reference to the property of infants. In one of these cases where an infant was absolutely entitled, subject to certain trusts, to the beneficial interest in real estate, the legal estate being in trustees, the Court decided that it had jurisdiction to direct money to be raised by means of a mortgage of the estate, for the purpose of paying the cost of certain repairs which were absolutely necessary. In this case the judge said that this jurisdiction should be jealously exercised, and only in cases which amount to actual salvage <sup>(2)</sup>.

Infants' property.

In another case where real and residuary personal property had been devised and bequeathed to trustees in trust for a man for his life, with remainder to his children who were infants, and there was no investment clause in the will, the Court on being satisfied on the evidence that the proposed outlay would be to the advantage of the infants, authorised the trustees to advance part of the personal estate to the tenant for life, for the purpose of stocking and cultivating a part of the real estate <sup>(3)</sup>.

In a case which came before the Court in 1887, the facts were as follows :—

“The owner of a public-house and cottages devised them to his widow during her life or widowhood, with remainder to his four infant children. His widow married again, but continued to reside in and manage the public-house; and she received the rents of the cottages and maintained the children. One of the children whilst still an infant married, but she and her husband for some months resided in the public-house. They then left it, and had not since received anything from the estate of the testator. She and her husband brought an action against her mother for one-fourth of the rents and profits. Under these circumstances the Court considered that the mother was to be

<sup>(1)</sup> *Calvert v. Godfrey*, 6 Beav. 97; *Field v. Moore*, 7 D. M. & G. 691; and see further Daniell's Chancery Practice, 6th ed. vol. i. p. 178; Seton on Decrees, 4th ed. p. 739; Dart's

Vendors and Purchasers, 6th ed. p. 2.

<sup>(2)</sup> *In re Jackson. Jackson v. Talbot*, 21 Ch. D. 786.

<sup>(3)</sup> *Re Household*, 27 Ch. D. 553.

considered in possession as bailiff for her infant children, and was accordingly liable as a trustee to account for the rents and profits, and that this liability was not altered by the facts, that the daughter had married and attained her majority <sup>(1)</sup>.

Settled  
Land Act,  
1882.

The Settled Land Act, 1882, provides that where a person who is in his own right, seized of, or entitled in possession to land, is an infant, then for the purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof. Where a tenant for life, or a person having the powers of a tenant for life, is an infant, the trustees of a settlement (if any), and if there are none, a person to be appointed by the Court for that purpose, may exercise them for him; and where the owner in possession of land is an infant, the land is to be deemed settled and the infant is to be deemed a tenant for life thereof <sup>(2)</sup>.

In a case decided by the late Sir George Jessel, the plaintiff had advanced money to an infant, partly in order to pay for necessities, and the infant had by deed assigned a reversionary interest. The plaintiff was held entitled to an account, and an order for repayment; but it was decided that the deed was not binding and that the security could not be enforced <sup>(3)</sup>.

Guardian-  
ship and  
custody of  
infants.

The law with regard to the guardianship and custody of infants has been made the subject of repeated legislation, beginning with a statute passed more than two centuries ago (12 Car. 2, c. 24), and culminating in the important enactment in favour of the rights of a mother in respect of the guardianship of her children, which was passed in 1886.

The important statute which abolished feudal tenures (*ante*, p. 12) contained a provision enabling a father, even during minority, to appoint guardians for his legitimate children either by deed or will <sup>(4)</sup>. Since the Wills Act, however, 1 Vict. c. 26, which came into operation 1st January, 1838, the appointment of a guardian by a minor can only be effected by deed.

Talfourd's  
Act.

An Act passed soon after the commencement of the present reign, known as Talfourd's Act (2 & 3 Vict. c. 54), enabled the Court to give a mother access to and custody of her children

<sup>(1)</sup> *Wall v. Stanwick*, 34 Ch. D. 763; and see *In re Hobbs*, 36 Ch. D. 553, where it was held that the right was not barred by the Statute of Limitations.

<sup>(2)</sup> 45 & 46 Vict. c. 38, ss. 59, 60; *In re Morgan*, 24 Ch. D. 114; *In re Duke of Newcastle's Estates*, 24 Ch. D. 129; *In re Price*, 27 Ch. D. 552; *In re Countess of Dudley's Contract*,

35 Ch. D. 338.

<sup>(3)</sup> See as to charging infant's maintenance on infant's real estate: *Re Howarth*, L. R. 8 Ch. 415; *Re Hamilton*, 31 Ch. D. 291; *Cadman v. Cadman*, 33 Ch. D. 397; and see as to maintenance, &c., *ante*, p. 137.

<sup>(4)</sup> *Steeman v. Wilson*, L. R. 13 Eq. 36.

under seven years of age. The age of seven was extended to sixteen by the Infants' Custody Act, 1873 (36 & 37 Vict. c. 12, which repeals 2 & 3 Vict. c. 54) <sup>(1)</sup>. The provisions of the Act of 1873 on this subject appear practically superseded by the Guardianship of Infants Act, 1886 (*infra*), but its 2nd section contains the following important provisions with regard to the custody of infants in cases where the parents have been separated. "No agreement contained in any separation deed made between the father and mother of an infant or infants, shall be held to be invalid by reason of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother. Provided always, that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto."

Custody of  
infants.

An Act which came into operation on the 25th June, 1886, entitled "the Guardianship of Infants Act, 1886," introduces very large changes in favour of the mother's right in the law with regard to the guardianship and custody of infants.

Guardian-  
ship of  
Infants  
Act, 1886.

Sect. 2 provides that on the death of the father the mother, if surviving, shall be guardian either *alone*, when no guardian has been appointed by the father, or *jointly* with any guardian appointed by the father. When no guardian has been appointed by the father or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother.

Sect. 3 enables the mother of any infant by deed or will to appoint guardians after the death of herself and the father of such infant (if such infant be then unmarried), and provides that where guardians are appointed by *both* parents they are to act *jointly*.

The mother is also enabled to make a *provisional* nomination of some fit person or persons to act jointly with the father after her death, "and the Court, after her death, if it be shewn to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, or make such other order in respect of the guardianship as the Court shall think right."

In the event of guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply

(1) See, on this Act, *In re Taylor*, 4 Ch. D. 157; *In re Besant*, 11 Ch. D. 508; *Besant v. Wood*, 12 Ch. D. 605; *In re Holt*, 16 Ch. D. 115; *In re Elderton*, 25 Ch. D. 220; *In re Ethel Brown*, 13 Q. B. D. 614.

Guardian-  
ship of  
Infants  
Act, 1886.

to the Court for its direction, and the Court may make such order or orders regarding the matters in difference as it shall think proper.

Sect. 4 provides that guardians under this Act are to have the power of guardians appointed under 12 Car. 2, c. 24.

The most important change, however, introduced by this Act is that with regard to the position of the mother in respect of the custody of the children. Sect. 5 provides that the Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and the conduct of the parents, and to the wishes *as well of the mother as of the father* (1).

Religion of  
infants.

The law with regard to the rights of a surviving mother as statutory guardian of her children under this Act was carefully considered in a case which came before the Court in 1888, where it was laid down that the principles that the father in his lifetime has the absolute right to decide what religious education his children shall receive, and that after his death the guardians of the children are bound to see that they are brought up in the religious faith of their father, are unaffected by the Guardianship of Infants Act, 1886. The law on this important subject is extremely well stated in the following passages from previous judgments which were cited in the present case:—

“The father has in his lifetime to decide what religious education his children shall receive. If a good and honest father, taking into his consideration the past teaching to which his children have been, in fact, subject, and the effect of that teaching on their minds, and the risk of unsettling their convictions, comes to the conclusion that it is right, and for their welfare, temporal and spiritual, that he should take means to counteract that teaching, and undo its effect, he is by law the proper and sole judge of that, and we, as judges of the land, have no more right to sit in appeal from the conclusion which he has conscientiously and honestly arrived at, than we should have to sit in appeal from his conclusion as to the particular church his children should attend, the particular sermons they

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(1) The Court also may alter, vary or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the

costs of the mother, and the liability of the father for the same, or otherwise as to costs as it may think just. See, as to misconduct of father: *Skinner v. Skinner*, 13 P. D. 90; *In re Witten*, W. N. 1887, 167.

should hear, or the particular religious books to be placed in their hands. He is quite as likely to judge rightly as we are to judge for him. At all events, the law has made him, and not us, the judge, and we cannot interfere with him in his honest exercise of the jurisdiction which the law has confided to him."

Religion of infants.

"The father, although not unfitted to discharge the duties of a father, may have acted in such a way as to preclude himself in a particular instance from insisting on rights he would otherwise have; as where a father has allowed, in consequence of money being left to a child, the child to live with a relative, and be brought up in a way not suited to its former station in life or to the means of the father. There the Court says you have allowed that to be done, and to alter that would be such an injury to the child that you have precluded yourself from exercising your power as a father in that particular respect, and then the Court interferes to prevent the father from having the custody of the child, not because he is immoral or has forfeited all his rights, but because in that particular instance he has so acted as to preclude himself from insisting on what otherwise would be his right."

"The father has the natural authority. Except in cases of immorality, or where he is clearly not exercising a discretion at all, but a wicked or cruel caprice, or where he is endeavouring to withdraw from the protection of the Court, which is entrusted with such protection by law, the custody of the infant, as a rule this Court does not and cannot interfere, because it cannot do so successfully, or rather because it cannot do so with the certainty that its doing so would not be attended with far greater injury both to the infant itself and also to general social life" (1).

The term "Ward of Court," Mr. Simpson tells us (2), properly means a person under the care of a guardian appointed by the Court of Chancery; but the term has been extended to infants who are brought under the authority of the Court by an application to it on their behalf, though no guardian is appointed by the Court. As a general rule the Court considers it for the benefit of the infant to be made a ward of Court (3).

Ward of Court.

"In one sense all British subjects who are infants are wards of Court, because they are subject to that sort of

(1) *In re Scanlan, Infants*, L. R. 40 Ch. D. 200.

*et seq.*

(3) *Clayton v Clarke*, 7 Jur. (N.S.)

(2) See Simpson on Infants, p. 223,

563.

parental jurisdiction which is entrusted to the Court in this country, and which has been administered continually by the Courts of the Chancery Division. It may be exercised as it has been in many cases as *In re Flynn* <sup>(1)</sup> and *In re Spence* <sup>(2)</sup> whether they have property or not, although, of course, where the infant has no property it makes it extremely difficult to exercise the jurisdiction at all; but supposing a case to arise respecting the custody of the infant, it has been declared again and again, and especially in those two cases, that it is not the fact of their being properly under the control of the Court of Chancery which gives the jurisdiction. The jurisdiction exists from the fact that the infant is a British subject, and the Chancery Division has always exercised that parental jurisdiction over British subjects who are infants" <sup>(3)</sup>.

Infant how  
made ward  
of Court.

It has been held that an infant is made a ward of Court where an order for maintenance is made <sup>(4)</sup>, or where a fund, belonging to the infant is paid into Court under the Trustee Relief Act <sup>(5)</sup>, but not by the carrying over of a sum to the separate account of the infant in a suit to which the infant is not a party <sup>(6)</sup>, nor by an order under the Divorce Act, s. 35 <sup>(7)</sup>.

Infants'  
Marriage  
Settlement  
Act.

An Act was passed in the year 1855, known as the Infants' Marriage Settlement Act <sup>(8)</sup>, which enables any infant, with the sanction of the Court of Chancery (now Chancery Division) to make a valid and binding settlement upon or in contemplation of his or her marriage. This power may be exercised by a male infant not under the age of twenty years, and by a female infant not under seventeen years. The settlement may be of all or any part of his or her property, or of property over which he or she has any power of appointment, unless it be expressly declared that it shall not be exercised by an infant; but it is provided that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any *infant tenant in tail* <sup>(9)</sup> under the Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.

The provisions of this Act have been made the subject of consideration in several recent cases. It has been decided that

<sup>(1)</sup> 2 De G. & Sm. 457.

<sup>(2)</sup> 2 Ph. 247.

<sup>(3)</sup> Per Kay, J., in *Brown v. Collins*, 25 Ch. D. 60, where *De Pereda v. De Mancha*, 19 Ch. D. 451, is commented on.

<sup>(4)</sup> *Re Graham*, 10 Eq. 530.

<sup>(5)</sup> *Re Benand*, 16 W. R. 538.

<sup>(6)</sup> *Brown v. Collins*, 25 Ch. D. 56.

<sup>(7)</sup> *Hyde v. Hyde*, 13 P. D. 166.

<sup>(8)</sup> 18 & 19 Vict. c. 43, and see R. S. C., 1883, O. lv., r. 26.

<sup>(9)</sup> See *Re Scott* (1891), 1 Ch. 298.

the Act applies to settlements made after the marriage has taken place <sup>(1)</sup>. In another case it was laid down that the Court has no jurisdiction to compel an infant ward of Court to make a settlement of his own property because he has been guilty of contempt in marrying without leave <sup>(2)</sup>.

The reader who desires further information of the law as to infants, is referred to Simpson on Infants; Seton on Decrees, p. 705, *et seq.* See, as to exercise of powers by infants *D'Angibau*, 15 Ch. D. 228; and as to partition actions: *Rimington v. Hartley*, 14 Ch. D. 630. As to apprenticeship articles: see *De Francesco v. Barnum*, 43 Ch. D. 165; and as to settlements being voidable and not void: *Duncan v. Dixon*, 44 Ch. D. 211; as to *habeas corpus*, *Reg. v. Barnardo*, 23 Q. B. D. 305; *The Queen v. Barnardo*, 24 Q. B. D. 283.

Reference  
to autho-  
rities.

<sup>(1)</sup> *Re Sampson and Wall*, 25 Ch. D. 482.

<sup>(2)</sup> *Re Leigh*, 40 Ch. D. 290, and see *Seaton v. Seaton*, 13 App. Cas. 61, where it was decided that the Act removes the disability of infants, leaving unaffected the disability of

côverture. This case, however, has reference to cases under Malins' Act (20 & 21 Vict. c. 57), which are now, since the passing of the Married Women's Property Act, 1882, of comparatively slight importance.

## CHAPTER X.

PARTNERSHIP <sup>(1)</sup>.

The Law of Partnership has been to a great extent codified by the Act to declare and amend the law of partnership, which is to be cited as "The Partnership Act, 1890" (53 & 54 Vict. c. 39), which came into effect 1st January, 1891. It is however expressly provided by the Act "that the rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of the Act" <sup>(2)</sup>. The subject of partnership is treated in the Act under the following heads:—

1. Nature of Partnership.
2. Relation of Partners to persons dealing with them.
3. Relations of Partners to one another.
4. Dissolution of Partnership and its consequences <sup>(3)</sup>.

*Nature of Partnership.*

Definition  
of partner-  
ship.

Partnership is now defined by the first section of that Act <sup>(4)</sup> as "the relation which subsists between persons carrying on a business in common with a view of profit" <sup>(5)</sup>.

<sup>(1)</sup> All causes and matters for the dissolution of partnerships, or the taking of partnership or other accounts, are assigned to the Chancery Division of the High Court of Justice by the 34th sect. of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66).

<sup>(2)</sup> This Act repeals sect. 7 of 19 & 20 Vict. c. 60, The Mercantile Law Amendment (Scotland) Act, 1856; Sect. 4 of 19 & 20 Vict. c. 97, the Mercantile Amendment Act, 1856, and the whole of the Act, 28 & 29 Vict. c. 86 (an Act to amend the law of partnership) which is generally known as Bovill's Act.

<sup>(3)</sup> There is also a supplemental part, sect. 45–50, dealing with definitions of "court" and "business," saving of rules of equity and common law, and other matters. The schedule contains the names of the Acts re-

pealed.

<sup>(4)</sup> See as to the previous definition of Partnership Tudor's Leading Cases in Mercantile Law, 3rd ed. p. 519. See also Lindley on Partnership, 5th ed. p. 24, where a great number of definitions of partnership are collected: *Pooley v. Driver*, 5 Ch. D. 458. In this case Sir George Jessel approved of the definition given in the Civil Code of New York, that a partnership is the "association of two or more persons for the purpose of carrying on business together and dividing its profits between them," with the addition supplied by Pothier "that the business must be an honest one"; and see Brett's Leading Cases in Modern Equity, p. 74, *et seq.*

<sup>(5)</sup> The expression "business" is defined by sect. 45 of the Partnership Act, 1890, to include "every trade, occupation, or profession."



The Act then goes on to declare that the relation between members of any company or association which is—

- (a) “Registered as a company under the Companies Act, 1862 (25 & 26 Vict. c. 89), or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies; or
- (b) “Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or
- (c) “A company engaged in working mines within and subject to the jurisdiction of the Stannaries :—is not a partnership within the meaning of the Act.”

How are we to know whether a partnership exists in any particular instance?

Here the legislature has supplied us with materials for an answer. Sect. 2 provides that in determining whether a partnership does or does not exist, regard shall be had to the following rules :

Rules for determining existence of partnership.

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership *does not of itself* create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2) The sharing of gross returns *does not of itself* create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, *does not of itself* make him a partner in the business; and in particular—

(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business *does not of itself* make him a partner in the business or liable as such :

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business *does not of itself* make the servant or agent a partner in the business or liable as such :

(c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is *not by reason only* of such receipt a partner in the business or liable as such :

(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, *does not of itself* make the lender a partner with the person or persons carrying on the business, or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto:

(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is *not by reason only* of such receipt a partner in the business or liable as such.

The privilege by this section conferred upon the lender of money to a person engaged or about to engage in a business and upon the vendor of the goodwill of a business is, however, counter-balanced to some extent, at all events, by the provision of the next section, which, under certain circumstances, postpones their claims until all the other creditors have been paid in full <sup>(1)</sup>.

Sect. 3 of the Partnership Act, 1890, provides as follows:—

“In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other

Postpone-  
ment of  
rights of  
person  
lending or  
selling in  
considera-  
tion of  
share of  
profits in  
case of in-  
solvency.

<sup>(1)</sup> It was decided in the similar provision contained in sect. 5 of 28 & 29 Vict. c. 86 that the lender does not lose the benefit of any security which he may have received, and that he may sell or foreclose even to the prejudice of other creditors. *Ex parte Sheil, In re Lonergan*, 4 Ch. Div. 789; *Badeley v. Consolidated Bank*, 34 Ch. D. 536; on appeal 38 Ch. Div. 238.

It was also decided, on the other hand, that all other creditors must be paid in full before the lender can carry in a proof in bankruptcy for any purpose whatever. *Ex parte Taylor, In re Grayson*, 12 Ch. Div.

366; *In re Stone*, 33 Ch. D. 541; and see *Holme v. Hammond*, L. R. 7 Ex. 218; *Ex parte Mills, In re Tew*, L. R. 8 Ch. 569; Lindley on Partnership, 5th ed., pp. 36, *et seq.*

The following cases decided on the law prior to the Partnership Act, 1890, may still be valuable as throwing light on the present law: *Syers v. Syers*, 1 App. Cas. 174; *Pooley v. Driver*, 5 Ch. D. 458; *Ex parte Tennent, In re Howard*, 6 Ch. Div. 303; *Ex parte Delhasse. In re Megevand*, 7 Ch. Div. 511; *In re Flavell, Murray v. Flavell*, 25 Ch. Div. 89.

creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied (1)."

And now having thus considered the law as to the nature of partnership, let us next review the leading rules and principles by which partnerships are governed.

At common law, and independently of statute, the number of persons who might carry on a business as partners was unlimited, but by the Companies Act, 1862, any trading association was declared to be an illegal association if more than ten persons in the case of bankers, and twenty in any other business, were so engaged, unless such association was registered in accordance with the provisions of the Act (see *post*, p. 634).

A partnership must be constituted for some *lawful purpose*. There cannot be a partnership for an immoral or an illegal object, or for any purpose in contravention of an Act of Parliament. Accordingly, there could not be a valid partnership for the keeping of a house of ill-fame; for the sale of obscene pictures; or for smuggling. A partner in a gaming house, said Sir George Jessel, could not bring an action against another for an account of profits (2).

Essentials  
of partner-  
ship.

An extreme illustration of this principle is to be found in a celebrated case, possibly of apocryphal authority, in which a suit is said to have been instituted by one highwayman against another for an account of their plunder on Hounslow Heath and at a variety of other places. The bill is said to have been dismissed with costs, and among the minor troubles which befell the various parties concerned, it may be mentioned that the costs were to be paid by the counsel who commenced the proceedings, while the plaintiffs' solicitors were attached and fined (3).

(1) Sect. 47 of the Act provides that in the application of the Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts, and also in the case of an individual the issue against him of a decree of *cessio bonorum*, and that nothing in the Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof.

With regard to the meaning of the term "firm," the Act provides (sect. 4) that (1) persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried

on is called the firm-name. (2.) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro rata* from the firm and its other members.

(2) Tudor's Mercantile Law, p. 525, 3rd ed.; *Sykes v. Beadon*, 11 Ch. D. 170, 196.

(3) The plaintiff and defendant, the story goes on to say, were both hanged, and one of the solicitors was subsequently convicted, but reprieved, and "only transported."—Lindley on Partnership, 5th ed. p. 94; 20 Eq. 230; 11 Ch. D. 195.

A partnership in the ordinary sense between a person duly qualified to act as a solicitor, and one who is not so qualified, is illegal; but if the non-qualified person is not to act as a solicitor in order to obtain a share of profits, there is no illegality—*e.g.* the widow of a late partner may take a share of profits as a partner <sup>(1)</sup>.

The general principle of the law is that all persons who are *sui juris*, with the exception of felons or outlaws, are able to enter into the contract of partnership. An infant may be a partner, but he incurs no liability, and is not responsible for debts, and when he comes of age, or even before, he may disclaim past business transactions. He cannot, however, repudiate in part. A married woman may be a partner as regards her separate estate <sup>(2)</sup>.

An alien friend may enter into a partnership in this country, but an alien enemy, or any person domiciled in an enemy's country, cannot be a partner in this country. If war breaks out between the countries in which the partners are respectively domiciled this at once puts an end to the partnership.

Partners are either ostensible, nominal, or dormant.

Ostensible partners are those who really are and appear to the world as partners.

Nominal partners are those who, though they have no interest in the firm, appear and are held out to the world as partners.

Dormant partners are those who are not known to the world as partners, and who do not intermeddle with the partnership affairs or take any part in its management, but who, as they share in the profits, are ordinarily liable to third parties <sup>(3)</sup>.

There may also be a sub-partnership—a partnership within a partnership. Thus, for instance, if A., B., and C. are partners, and C. enters into an agreement to share his profits with D., a stranger to the firm, that does not render D. a partner with A. and B. The English law Courts proceed upon the principle of the Roman Law, *Socius mei socii, socius meus non est*, which may be freely translated, my partner's partner is not

<sup>(1)</sup> Lindley on Partnership, 5th ed. p. 100.

<sup>(2)</sup> Lindley on Partnership, 5th ed. p. 73, *et seq.*

<sup>(3)</sup> A dormant partner, known to a few persons to be a partner, is not dormant as to them: Lindley on Partnership, 5th ed. p. 212. A marked difference between the lia-

bilities of an ostensible and a dormant partner is that the liability of the ostensible partner who has continued after the dissolution of the partnership, and the removal of his name therefrom until due notice has been given of such dissolution: Smith's Leading Cases, vol. i. 9th ed. p. 904.

Different kinds of partners.

Sub-partnership.

necessarily my partner. This point was well illustrated by Lord Eldon in deciding a case which came before him as follows "A Mr. Fletcher agreed with Sir Charles Raymond, a banker in the City, that he should be interested so far as to receive a share of his profits of the business, which share he had a right to draw out from the firm of Raymond & Co. It was held that Fletcher was no partner in that partnership; had no demand against it; had no account in it; and that he must be satisfied with a share of the profits given to Sir Charles Raymond" <sup>(1)</sup>.

Ordinary partnerships, said Lord Justice James in a celebrated judgment, are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner. As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership. A partner who may not have a farthing of capital left may take moneys or assets of this partnership to the value of millions, may bind the partnership by contracts to any amount, may give the partnership acceptances for any amount, and may even—as has been shown in many painful instances in this Court—involve his innocent partners in unlimited amounts for frauds which he has craftily concealed from them <sup>(2)</sup>.

Let us now consider the provisions of the Partnership Act, 1890, with regard to

### *Relations of Partners to persons dealing with them.*

Sect. 5 declares that every partner is an agent of the firm and his other partners *for the purpose of the business of the partnership*; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners unless (1) the partner so acting has in fact no authority to act for the firm in the particular matter, and (2) the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

Power of partner to bind the firm.

<sup>(1)</sup> Lindley on Partnership, 5th ed. p. 48.

*culturist Cattle Insurance Co. Baird's Case*, L. R. 5 Ch. 725.

<sup>(2)</sup> Per James, L.J., in *In re Agri-*

Sections 6, 7, and 8 provide as follows :—

Partners bound by acts on behalf of firm.

An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

Partner using credit of firm for private purposes.

Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.

Effect of notice that firm will not be bound by acts of partner.

If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement <sup>(1)</sup>.

The following are the provisions of the Partnership Act, 1890, with regard to—

### *The Liability of the Firm for Wrongs.*

Sects. 10, 11, 12, and 13, provide as follows :—

Liability of the firm for wrongs.

(10) Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Misapplication of money or property received for or in custody of the firm.

(11) In the following cases; namely—

(a.) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(b.) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss.

<sup>(1)</sup> Sect. 9 provides as to the liability of partners that every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death

his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

Liability for wrongs joint and several.

If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein:

Improper employment of trust-property for partnership purposes.

Provided as follows:—

- (1) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and
- (2) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

The law with regard to the liability of a firm of solicitors for the default of a partner who has been intrusted with money for the purpose of investment has been considered in a great many cases. Where money is received by a partner for the purpose of being invested on a *particular* security the firm is liable, as this is regarded as within the ordinary business of the firm. Where, on the other hand, one of a firm receives a sum of money from a client for the *general* purpose of investing it as soon as he can meet with a good security, this is not inside the ordinary business of the partnership, as such a transaction is not part of the business of solicitors, but of scriveners. The firm, however, may be rendered liable by a course of conduct of the other partners <sup>(1)</sup>.

Solicitors as partners.

It has been laid down that it is within the ordinary everyday practice for a firm of solicitors to receive moneys from a client for the purpose of satisfying the demands of the creditors with whom they are employed to arrange; to receive from a client or executor moneys sometimes to pay the demands of Government, sometimes to pay legatees, and sometimes to pay into Court; in short, to receive money for any specific purpose connected with the professional business they have in hand <sup>(2)</sup>.

It must, however, be borne in mind that the liability of a

<sup>(1)</sup> A firm is liable for frauds committed by one of its members while acting for the firm, and in transacting its business; and the innocent partners cannot divest themselves of responsibility on the ground that they did not authorize the fraud. Lindley on Partnership, 5th ed.

p. 150.

<sup>(2)</sup> *Blair v. Bromley*, 5 Hare, 542; 2 Phil. 354; *Harman v. Johnson*, 2 E. & B. 61; *Earl of Dundonald v. Masterman*, L. R. 7 Eq. 504; *Plumer v. Gregory*, L. R. 18 Eq. 621; *Cleather v. Twisden*, 28 Ch. Div. 340; and see Brett's Leading Cases, 77, et seq.

firm for the acts of its co-partners is not so extensive as *non-lawyers* sometimes imagine. The act of one partner to bind the firm must be necessary for the carrying on of its business. If it was only convenient, or only facilitated the transaction of the business of the firm, that is not sufficient in the absence of evidence of sanction by the other partners. Even necessity is not sufficient if it be an extraordinary necessity. What is necessary for carrying on the business of the firm under ordinary circumstances, and in the usual way is the test <sup>(1)</sup>.

It should also be borne in mind that a man may by his conduct in holding himself out as a partner, and leading other people to suppose that he is a member of a partnership, incur the liabilities of a partner, though he does not share either the profits or the losses of the business. This is an illustration of the doctrine of estoppel of which we shall speak hereafter <sup>(2)</sup> (*post*, p. 862). The provisions of the Partnership Act, 1890, on this subject and the kindred subject of admissions and representations of partners (sects. 14 & 15), are as follows:—

Persons  
liable by  
“holding  
out.”

(1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

(2) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors' or administrators' estate or effects liable for any partnership debts contracted after his death.

Admissions  
and repre-  
sentations  
of partners.

An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

What is sufficient notice to a firm, and what consequences result from changes in a firm? These questions were settled by the Partnership Act, 1890, as follows:

Notice to  
acting  
partner to  
be notice  
to the firm.

Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates

<sup>(1)</sup> Lindley on Partnership, 5th ed. p. 126, cited by North, J., in *In re Cunningham & Co., Limited*. *Simpson's Claim*, 36 Ch. D. 539.

<sup>(2)</sup> Lindley on Partnership, 5th ed. 40; *Scarfe v. Jardine*, 7 App. Cas. 345.



as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

Liabilities  
of incoming  
and out-  
going  
partners.

A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given <sup>(1)</sup>.

Revocation  
of con-  
tinuing  
guaranty  
by change  
in firm.

The release of one debtor by the substitution of another is called "novation"—a term borrowed from the Roman law. A common instance of novation in partnership cases is where, upon the dissolution of a partnership, the persons who are going to continue in business agree and undertake, as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets; and if in that case they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes a contract between the creditor who accedes and the new firm, to the effect that he will accept their liability instead of the old liability, and, on the other hand, that they promise to pay him for that consideration <sup>(2)</sup>.

Novation.

The rights and obligations of partners, so far as they concern the members of the partnership, are generally regulated, at least, to some extent, by "partnership articles." With regard to the construction of these articles the following important principles should be borne in mind <sup>(3)</sup>: (1) they are not intended to define the rights and obligations of the partners, which, so far as they are not expressly declared, must be determined by general principles; (2) they must be construed with special

Partner-  
ship  
articles.

<sup>(1)</sup> 53 & 54 Vict. c. 39, ss. 16, 17, 345, 351.

<sup>(2)</sup> See further, Lindley on Part-  
nership, 5th ed. p. 406, *et seq.*

<sup>(3)</sup> *Scarff v. Jardine*, 7 App. Cas.

reference to the end and object of the partnership so as to defeat fraud and unfair dealing, and they may be waived by the consent of all the partners, which may be inferred from conduct, if not declared by express words.

The following are the provisions of the Partnership Act, 1890, with regard to

*Relations of Partners to one another.*

Variation  
by consent  
of terms of  
partner-  
ship.

Partner-  
ship pro-  
perty.

The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

Partnership property is defined for the purposes of the Act as "all property and rights and interests in property originally brought into partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business," and such property must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement <sup>(1)</sup>.

Property  
bought  
with part-  
nership  
money.

Conversion  
into per-  
sonal  
estate of  
land held  
as partner-  
ship pro-  
perty.

Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate <sup>(2)</sup>.

A very important change is introduced into the law with regard to procedure when a judgment has been obtained for a partner's separate debt.

<sup>(1)</sup> 53 & 54 Vict. c. 39, ss. 19, 20. Sect. 20. Sub-sect. (2) provides that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

<sup>(3)</sup> Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not

being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

<sup>(2)</sup> 53 & 54 Vict. c. 39, ss. 21, 22.

Sect. 23 provides that after the commencement of the Act a writ of execution shall not issue against any partnership property except on a judgment against the firm. <sup>(1)</sup>

A series of rules by which the interests of partners in the partnership property, and their rights and duties in relation to the partnership are to be determined, *subject to any agreement, express or implied, between the partners*, have been prescribed by the Partnership Act, 1890, s. 24. These rules are as follows:—

Procedure against partnership property for a partner's separate judgment debt.

Rules as to interests and duties of partners subject to special agreement.

- (1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.
- (2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—
  - (a) In the ordinary and proper conduct of the business of the firm; or,
  - (b) In or about anything necessarily done for the preservation of the business or property of the firm.
- (3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.
- (4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

<sup>(1)</sup> The further provisions of the section on this subject are as follows:

(2) The High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the

case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act.

(5) This section shall not apply to Scotland.

See as to previous law: *Whetham v. Davey*, 30 Ch. D. 574, where the form of order is considered and given, pp. 579, 580; *Helmores v. Smith*, 35 Ch. D. 436; *Lindley on Partnership*, 5th ed. p. 356, *et seq.*; and as to charge on money in hands of receiver: *Kewney v. Attrill*, 34 Ch. D. 345. The present section is said to have been suggested by Mr. Justice Lindley: *Pollock's Digest of the Law of Partnership*, 5th ed. p. 68.

- (5) Every partner may take part in the management of the partnership business.
- (6) No partner shall be entitled to remuneration for acting in the partnership business.
- (7) No person may be introduced as a partner without the consent of all existing partners.
- (8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.
- (9) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

Rules have also been prescribed by the legislature with regard to the expulsion of a partner, the retirement of a partner from a partnership at will, and with regard to the continuance of a partnership beyond the agreed term. Sects. 25, 26, and 27 of the Partnership Act provide that

Expulsion  
of partner.

No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

Retirement  
from part-  
nership at  
will.

Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.

Where  
partner-  
ship for  
term is  
continued  
over, con-  
tinuance  
on old  
terms pre-  
sumed.

Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership <sup>(1)</sup>.

(1) 53 & 54 Vict. c. 39, ss. 25, 26, 27. Sect. 25 affirms the existing law. Observe as to sect. 26 that the notice must be in writing signed by

the partner giving it, but need not be under seal. See as to continuance of partnership: *Neilson v. Mossend Iron Co.*, 11 App. Cas. 298.

It has been laid down by the House of Lords that "a man obtaining his *locus standi*, and his opportunity for making such arrangements, by the position he occupies as a partner, is bound by his obligation to his co-partners in such dealings not to separate his interest from theirs, but, if he acquires any benefit, to communicate it to them." (1)

The subject of the duty of partners to each other to render accounts, the accountability of partners for private profits, and the duty of a partner not to compete with the firm of which he is a member, are dealt with by the Partnership Act, 1890, ss. 28, 29, 30, in the following manner:—

"Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

Duty of partners to account, &c., and not to compete with firm.

"Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name, or business connection.

"This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

"If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business." (2)

(1) *Cassels v. Stewart*, 6 App. Cas. 64.

(2) 53 & 54 Vict. c. 39, ss. 28, 29, 30. With regard to the rights of an assignee of a share in a partnership, sect. 31 provides as follows:—

(1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles

the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

Next may be considered the provisions of the Partnership Act with regard to

*Dissolution of Partnership, and its consequences.*

Dissolution  
by expira-  
tion or  
notice.

"Subject to any agreement between the partners, a partnership is dissolved—

"(a) If entered into for a fixed term, by the expiration of that term :

"(b) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking :

"(c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

"In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

Dissolution  
by bank-  
ruptcy,  
death, or  
charge.

"Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

"A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt <sup>(1)</sup>.

Dissolution  
by ille-  
gality of  
partner-  
ship.

"A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership." <sup>(2)</sup>

Let us next consider the subject of

*Dissolution of Partnership by the Court.*

Sect. 35 provides as follows :—"On application by a partner the Court may decree a dissolution of the partnership in any of the following cases :—

Dissolution  
by the  
Court.

"(a) When a partner is found lunatic <sup>(3)</sup> by inquisition, or in Scotland by cognition, or is shewn to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or

<sup>(1)</sup> Under sect. 23, *ante*, p. 625, note.

<sup>(2)</sup> 53 & 54 Vict. c. 39, ss. 32, 33, 34. It would seem clear that under the present law, the marriage of a

female partner does not dissolve the partnership (45 & 46 Vict. c. 75), s. 1.

<sup>(3)</sup> See also Lunacy Act, 1890 (53 Vict. c. 5), s. 119, and Lindley, Supplement, p. 86.

next friend or person having title to intervene as by any other partner :

- “(b) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract :
- “(c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business :
- “(d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him :
- “(e) When the business of the partnership can only be carried on at a loss :
- “(f) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.”

The Act next deals with the rights of persons dealing with a firm after a change in its constitution, with the right of any partner to notify a dissolution, with the continuing authority of partners for the purpose of winding up the partnership and with the rights of partners as to the application of partnership property in the following manner :—

“Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

Rights of persons dealing with firm against apparent members of firm.

“The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively. <sup>(1)</sup>

“On the dissolution of a partnership or retirement of a partner

Right of partners to notify dissolution.

<sup>(1)</sup> 53 & 54 Vict. c. 39, s. 36, sub-s. 2, provides that “an advertisement in the *London Gazette* as to a firm whose principal place of business is in England or Wales, in the *Edinburgh Gazette* as to a firm whose principal place of business is in

Scotland, and in the *Dublin Gazette* as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.”

any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence. <sup>(1)</sup>

Continuing authority of partners for purposes of winding up.

After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution *so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.* <sup>(2)</sup>

Rights of partners as to application of partnership property.

“On the dissolution of partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm.” <sup>(3)</sup>

Return of premium.

A partner often pays a premium on being taken into the partnership. Suppose now that the partnership is prematurely dissolved, otherwise than by the death of a partner, how is the sum of money so paid to be dealt with? <sup>(4)</sup> The law on this subject is settled by the Partnership Act, 1890, sect. 40, as follows:—

Apportionment of premium where partnership prematurely dissolved.

“Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term, otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard

<sup>(1)</sup> 53 & 54 Vict. c. 39, s. 37. It has been held that the Court has jurisdiction to compel a retiring partner to sign a notice of dissolution for the *Gazette* in an action in which no other specified relief is claimed; *Hendry v. Turner*, 32 Ch. D. 355.

<sup>(2)</sup> 53 & 54 Vict. c. 39, s. 38. It is, however, provided that the firm is in no case bound by the acts of a partner who has become bankrupt, “but this proviso does not affect the liability of any person who has after the bankruptcy represented himself

or knowingly suffered himself to be represented as a partner of the bankrupt.”

<sup>(3)</sup> 53 & 54 Vict. c. 39, s. 39.

<sup>(4)</sup> See *Atwood v. Maude*, L. R. 3 Ch. 369; *Wilson v. Johnstone*, L. R. 16 Eq. 606, 609; *Edmonds v. Robinson*, 29 Ch. D. 170; *Lyon v. Tweddell*, 17 Ch. D. 529, where it was laid down that in such cases the Court of Appeal will not interfere with the discretion of the judges of first instance, except on very special grounds.



to the terms of the partnership contract and to the length of time during which the partnership has continued ; unless

“(a) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

“(b) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.”

What are the rights of a person who has obtained rescission of a partnership contract? This question is answered by the Partnership Act, 1890, sect. 41, as follows—

“Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

Rights where partnership dissolved for fraud or misrepresentation.

“(a) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

“(b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

“(c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.”

Though a partner has left the firm a right to share profits may still continue in him or enure for the benefit of his estate on his death. This subject is dealt with in the Partnership Act, 1890, as follows (1):—

Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

Right of out-going partner in certain cases to share profits made after dissolution.

Provided that where by the partnership contract an option

(1) 53 & 54 Vict. c. 39, s. 42.

is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Is a surviving or continuing partner a trustee for an outgoing partner or the representatives of a deceased partner in respect of the amount (if any) which may be due, or is the relationship merely that of debtor and creditor? This question is answered by the Partnership Act, 1890, as follows:—

Retiring or deceased partner's share to be a debt.

“Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.”<sup>(1)</sup>

The Partnership Act, 1890, also prescribes certain rules with regard to the settlement of accounts after dissolution.

Rule for distribution of assets on final settlement of accounts.

“In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

- “(a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:
- “(b) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:

- “1. In paying the debts and liabilities of the firm to persons who are not partners therein:
- “2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:
- “3. In paying to each partner rateably what is due from the firm to him in respect of capital:
- “4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.”<sup>(2)</sup>

<sup>(1)</sup> 53 & 54 Vict. c. 39, s. 43, and see Lindley on Partnership, 5th ed. p. 510; *Knox v. Gye*, L. R. 5 H. L.

656; *Noyes v. Crawley*, 10 Ch. D. 31.  
<sup>(2)</sup> 53 & 54 Vict. c. 39, s. 44.

The Court will sometimes interfere between partners to prevent the breach of agreement or conduct contrary to good faith by granting an injunction, or by appointing a receiver, or receiver and manager. The effect of the appointment of a receiver is to take the affairs of the partnership out of the hands of all the partners, and to prevent any one, except the official of the Court, from dealing with them. A receiver cannot carry on the business unless he be appointed manager. The appointment of a receiver always operates as an injunction, but there is a broad difference between the appointment of a receiver and the granting of an injunction. An injunction only excludes from the management of the partnership business the partner against whom it is granted. The appointment of a receiver excludes all the partners. The Courts, as Lord Justice Lindley says, being by no means anxious to take upon themselves the management of partnership business, will not interfere in this way except under the most exceptional circumstances, unless with a view to a winding-up of the partnership <sup>(1)</sup>.

Injunction  
and re-  
ceiver.

The law with regard to the nature of partnership and the circumstances under which the contract will be rescinded was very recently considered in a case which came before the House of Lords <sup>(2)</sup>. The respondent had been induced by misrepresentations made without fraud by the appellants to become a partner in a business which either belonged to them or in which they were partners, and which was in fact insolvent. The business afterwards, owing to its own inherent vice, entirely failed with large liabilities.

Nature of  
partner-  
ship.

The House of Lords decided that the respondent was entitled to rescission of the contract and repayment of his capital, though the business which he restored to the appellants was worse than worthless, and that the contract being rescinded the appellants could not recover against him for money and goods sold by them to the partnership.

"If," said the Lord Chancellor, "a partnership in fact exists, a community of interest in the adventure being carried on in fact, no concealment of name, no verbal equivalent for the ordinary phrases of profit or loss, no indirect expedient for enforcing control over the adventure will prevent the substance and reality of the transaction being adjudged to be a partnership; and I think I should add, as applicable to this case, that the separation of different stipulations of one arrangement into

<sup>(1)</sup> Lindley on Partnership, 5th ed.  
p. 545; Kerr on Injunction, 3rd ed.  
p. 517.

<sup>(2)</sup> *Adam v. Newbigging*, 13 App.  
Cas. 308, 315.

different deeds will not alter the real arrangement, whatever in fact that arrangement is proved to be.

“And no ‘phrasing of it’ by dexterous draftsmen will avail to avert the legal consequences of the contract.”

The great rule to be observed in determining whether a partnership exists or not is that regard must be had to the true contract and intention of the parties as appearing from all the facts of the case. <sup>(1)</sup>

Reference  
to autho-  
rities.

The reader who desires further information on the interesting and difficult subject of the law relating to Partnership, independent of the Partnership Act, 1890, is referred, in the first place, to Lord Justice Lindley’s celebrated work on the subject. Valuable information will also be obtained in the notes to *Waugh v. Carver*, Smith’s Leading Cases, vol. i.; Tudor’s Leading Cases in Mercantile Law. See also Pollock’s Digest of the Law of Partnership, and notes to Brett’s Leading Cases, which deal with the law of partnership. See also *Niemann v. Niemann*, 43 Ch. D. 198; *Gray v. Smith*, 43 Ch. D. 208; *Farrar v. Cooper*, 44 Ch. D. 323 (Arbitration Clause).

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<sup>(1)</sup> *Cox v. Hickman*, 84 L. C. 268; *Badeley v. Consolidated Bank*, 38 Ch. D. 238, 258.

## CHAPTER XI.

## COMPANIES.

Having thus considered the subject of ordinary partnership, we pass on next to the law relating to joint stock companies.

"An ordinary partnership," said Lord Justice James, "is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another. A company or association is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members and to-morrow consisting of some only of those members along with others who have come in, so that there will be a constant shifting of the partnership, a determination of the old and a creation of a new partnership, and with the intention that so far as the partners can by agreement between themselves bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership." <sup>(1)</sup>

"A company," says Lord Justice Lindley <sup>(2)</sup>, "which is neither incorporated nor privileged by the Crown or the legislature is substantially a partnership; and although the transferability of its shares considerably modifies the application to it of the ordinary law of partnership, still the company, like an ordinary firm, is not in a legal point of view distinguishable from the members composing it." <sup>(3)</sup>

The 4th section of the Companies Act, 1862, provides that

Registration of companies.

<sup>(1)</sup> *Smith v. Anderson*, James, L.J., 15 Ch. D. 247; and see as to the statutory definition of what is and what is not a partnership, 53 & 54 Vict. c. 39, s. 1 (*ante*, p. 614.)

<sup>(2)</sup> Lindley on Partnership, 5th ed., p. 1.

<sup>(3)</sup> Corporations exist by common law or prescription (in which cases they are presumed to have been originally created by the Crown) or else by the express consent of the Crown, by Act of Parliament or Royal

Charter. One of the principal divisions of corporations is into corporation sole (*e.g.*, the sovereign, bishops, rectors, and vicars), and corporations aggregate. Tudor's Charitable Trusts, by L. S. Bristowe, and W. I. Cook 3rd ed., p. 67, *et seq.* (citing Grant on Corporations, p. 648, and other authorities) which see for other divisions of corporations. *Smith v. Anderson*, 15 Ch. D. 247; *Barton v. London and North Western Railway Co.*, 24 Q. B. D. 87.

no company, association, or partnership, consisting of more than ten persons, if it be formed for the purpose of carrying on the business of banking, or of twenty persons if it be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, shall be formed after the commencement of the Act (2nd November, 1862), unless it is (1) registered as a company under the Act; or is (2) formed in pursuance of some other Act of Parliament; or (3) of letters patent; or (4) is a company engaged in working mines within and subject to the jurisdiction of the Stannaries.

The aim of this enactment was stated in a leading case to be "to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed." <sup>(1)</sup>

The effect of non-registration is that the company is an illegal body. Its contracts are void for illegality, and cannot be enforced <sup>(2)</sup>.

Formation  
of com-  
panies.

Memoran-  
dum of  
association.

Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and registering it, form an incorporated company <sup>(3)</sup>. The memorandum of association must be stamped as it were a deed <sup>(4)</sup>, and each member of the company is entitled to a copy for a small fee. In the case of a limited company, it must contain the following things:—

- (1) The name of the proposed company, with the addition of the word "limited," as the last word in such name:
- (2) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate:
- (3) The objects for which the proposed company is to be established:
- (4) A declaration that the liability of the members is limited:

<sup>(1)</sup> *Smith v. Anderson*, 15 Ch. D. 247.

<sup>(2)</sup> See *Smith v. Anderson*, 15 Ch. D. 247, Brett's Leading Cases in Equity, p. 59, *et seq.*, where the authorities are reviewed. *Jennings v. Hammond*, 9 Q. B. D. 225; *Re Padstow Total Loss Assurance Assoc.*, 20 Ch. D. 137; *Shaw v. Benson*, 11 Q. B. D. 563; *Re Thomas*, 14 Q. B. D. 379.

<sup>(3)</sup> Companies Act, 1862, s. 18. If any company carries on business for

six months after the number of its members has been reduced to less than seven, every member of the company so carrying on business who is cognisant of the fact that it is carrying on business with less than seven members is severally liable for the payment of the whole debts of the company contracted during that time: Companies Act, 1862, s. 48.

<sup>(4)</sup> Companies Act, 1862, s. 11.

- (5) The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount. Memorandum of association.

Upon registration the members become a body corporate by the name contained in the memorandum capable of exercising all the functions of an incorporated company, and having perpetual succession and a common seal.

It will be necessary here, in connection with the subject of the formation of joint stock companies, to notice briefly the position of "promoters," who set in motion the machinery by which the Companies Act enables an incorporated company to be created. Promoters.

A "promoter" was defined by the late Chief Justice Cockburn to mean one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish the object. The position of promoters has been much considered in several important cases, by which their position has been defined. "The term 'promoter,'" said Lord Justice Lindley, "involves the idea of exertion for the purpose of getting up and starting a company, or, as it is called, floating it, and also the idea of some duty towards the company imposed by or arising from the promoter's position. It is a term not of law but of business, usually summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence."

"A promoter is in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so, but upon him as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward, or agent." <sup>(1)</sup>

Promoters may be classified as follows:—

(1) Professional promoters are those who make a business of promoting companies.

(2) Occasional promoters are those who occasionally see and take the opportunity for bringing out a company.

(3) Promoters *pro hac vice* are those who enter upon the work of promotion in a particular case, and cannot be classified as either professional or occasional promoters <sup>(2)</sup>.

<sup>(1)</sup> *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, per James, L.J., p. 118.

<sup>(2)</sup> *Palmer's Precedents*, 4th ed. p. 15; see as to definition of "promoter" for the purposes of the sec-

The  
company's  
name.

No company can be registered with a name identical with another, or so resembling it as to be calculated to deceive the public <sup>(1)</sup>, except in a case where the subsisting company is in the course of being dissolved, and testifies its consent in the required manner. The prospectus of a company ought to specify the dates and the names of parties to any contract made prior to its issue <sup>(2)</sup>.

The company may, with the sanction of a special resolution, and with the approval of the Board of Trade, in the manner prescribed by the Act, change its name and have the new name registered, but so that no such alteration shall affect any existing rights or obligations <sup>(3)</sup>.

Every limited company is bound under penalty to have its name painted or affixed in a conspicuous position on the outside of every office in which it carries on business, and to have its name engraven in legible characters on its seal and affixed to its documents <sup>(4)</sup>.

Memoran-  
dum of  
association.

The powers of the company—subject to the provisions of the Companies (Memorandum of Association) Act, 1890, which shall be presently noticed (*post*, p. 639)—are limited to the objects specified in the memorandum, which, when registered, binds the company and has the effect of a covenant by every member, his heirs, executors, and administrators, to observe all its conditions <sup>(5)</sup>. It is “the charter, and defines the limitations of the powers of a company established under the Act,” and anything done beyond its specified objects and matters fairly incidental thereto is beyond the powers of the company—is *ultra vires*, as it is called, and incapable of ratification, even by the whole body of shareholders. Thus, it was held that a railway company could not subscribe a sum out of their funds towards the erection of an Imperial Institute, notwithstanding that the Institute might probably cause an increase of passenger traffic over their line <sup>(6)</sup>. But an insurance company may, with a

tion: 53 & 54 Vict. c. 64 (the Director's Liability Act, 1890), s. 3, sub-s. 2, which provides that a person is not a promoter by reason of his acting in a professional capacity for persons engaged in promoting the formation of the company (*post*, p. 646).

<sup>(1)</sup> *Hendriks v. Montagu*, 17 Ch. D. 638; Companies Act, 1862, s. 20.

<sup>(2)</sup> Companies Act, 1867, s. 38; see the cases by which its wonderful comprehensiveness has been limited,

collected in note to Buckley's Companies Acts.

<sup>(3)</sup> Companies Act, 1862, s. 13. The change of name is not complete until entered on the register. *Shackelford v. Owen*, L. R. 3 C. P. 407.

<sup>(4)</sup> Companies Act, 1862, ss. 41, 42.

<sup>(5)</sup> Companies Act, 1862, ss. 14, 16.

<sup>(6)</sup> *Tomlinson v. South Eastern Railway Co.*, 35 Ch. D. 675.



view to attract customers, pay claims not legally covered by its policies <sup>(1)</sup>, and a company may, with the view of getting better work from its servants, give gratuities <sup>(2)</sup>, or make provision for the benefit of the family of a deceased servant <sup>(3)</sup>.

The test, as was stated by the Court of Appeal, is not whether such act is *bonâ fide*—for if *bona fides* were the sole test a lunatic might conduct the affairs of the company and pay away its money with both hands in a manner perfectly *bonâ fide* yet perfectly irrational,—but whether, as well as being done *bonâ fide*, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit. "It is for the directors to judge, provided it is a matter which is reasonably incidental to the carrying on of the business of the company, and a company which always treated its *employés* with Draconian severity, and never allowed them a single inch more than the strict letter of the bond, would soon find itself deserted—at all events, unless labour was very much more easy to obtain in the market than it often is. The law does not say there shall be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company." <sup>(4)</sup>

The Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), provides that, subject to the provisions of the Act, a company registered under the Companies Acts, 1862 to 1886, may, by special resolution (*post*, p. 656), alter the provisions of its memorandum of association or deed of settlement *with respect to the objects of the company, so far as may be required for any of the purposes in the Act specified*, or alter the form of its constitution by substituting a memorandum and articles of association for a deed of settlement, either with or without any such alteration with respect to the objects of the company. In no case, however, is any such alteration to take effect until confirmed on petition by the court which has jurisdiction to make an order for winding up the company (*post*, p. 650) <sup>(5)</sup>.

Power for company to alter objects or form of constitution subject to confirmation by the Court.

<sup>(1)</sup> *Taunton v. Royal Insurance Co.*, 2 H. & M. 135.

<sup>(2)</sup> *Hampson v. Price's Candle Co.*, 45 L. J. (Ch.) 437.

<sup>(3)</sup> *Henderson v. Bank of Australasia*, 40 Ch. D. 170.

<sup>(4)</sup> *Hutton v. West Cork Railway Co.*, 23 Ch. D. 654, 671.

<sup>(5)</sup> Before confirming any such alteration the Court must be satisfied—  
(a) that sufficient notice has been

given to every holder of debentures or debenture stock of the company, and any persons and class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and

(b) that, with respect to every creditor who in the opinion of the Court is entitled to

The circumstances under which the court may confirm, either wholly or in part, any such alteration with respect to the objects of the company, are prescribed by a subsequent section, viz., "if it appears that the alteration is required in order to enable the company—

- "(a) To carry on its businesses more economically or more efficiently; or
- "(b) To attain its main purpose by new or improved means; or
- "(c) To enlarge or change the local area of its operations; or
- "(d) To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company; or
- "(e) To restrict or abandon any of the objects specified in the memorandum of association or deed of settlement" <sup>(1)</sup>.

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object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court.

The Court has a power in the case of any person or class of persons, for special reasons, to dispense with the notice required by this section.

The Act also contains the following provisions on this subject:—

"An order confirming any such alteration made be made on such terms and subject to such conditions as to the Court seems fit, and the Court may make such orders as to costs as it deems proper."

"The Court shall, in exercising its discretion under this Act, have regard to the rights and interests of the members of the company, or of any class of those members, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and the Court may give such directions and make such orders as it may think expedient for the

purpose of facilitating any such arrangement or carrying the same into effect: Provided always, that it shall not be lawful to expend any part of the capital of the company in any such purchase."

Sect. 3 provides that the expression "deed of settlement" is to include "any contract of co-partnery or other instrument constituting or regulating the company and not being an Act of Parliament, a royal charter, or letters patent."

<sup>(1)</sup> 53 & 54 Vict. c. 62, s. 1. Sect. 2 provides that where a company has altered the provisions of its memorandum of association or deed of settlement with respect to the objects of the company, or has altered the form of its constitution by substituting a memorandum and articles of association for a deed of settlement, and such alteration has been confirmed by the Court, an office copy of the order confirming such alteration, together with a printed copy of the memorandum of association or deed of settlement so altered, or together with a printed copy of the substituted memorandum and articles of association (as the case may be), shall be delivered by the company to the registrar of joint stock companies within fifteen days from the date of the order. The

The memorandum of association may, in the case of a company limited by shares, and must, in the case of a company limited by guarantee, or unlimited, be accompanied, when registered, by articles of association. They may adopt all or any of the provisions in Table A in the schedule to the Act of 1862: and unless these regulations are excluded or modified by registered articles they are to be deemed the regulations of the company <sup>(1)</sup>.

The articles are to be printed, expressed in separate paragraphs numbered arithmetically, stamped with a 10s. deed stamp, and with a 5s. companies regulation stamp, and signed by each subscriber.

"The articles," said Lord Cairns, in a celebrated judgment, "play a subsidiary part to the memorandum of association. They accept the memorandum as the charter of incorporation of the company, and so accepting it the articles proceed to define the duties, the rights, and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulation of the company may from time to time be made" <sup>(2)</sup>.

Money payable in pursuance of such regulations is a specialty debt <sup>(3)</sup>, and when registered the articles operate as a covenant by each member to conform to the regulations, but as they are merely a contract by the shareholders *inter se*, "a person (being an outsider) in whose favour a stipulation is made is not in the same position as if he had entered into a contract with the company" <sup>(4)</sup>, and cannot enforce it.

registrar is to register it, and to certify under his hand the registration thereof, and his certificate "shall be conclusive evidence that all the requisitions of this Act with respect to such alteration and the confirmation thereof have been complied with, and thenceforth (but subject to the provisions of this Act) the memorandum or deed of settlement so altered shall be the memorandum of association or deed of settlement of the company, or, as the case may be, such substituted memorandum and articles of association shall apply to the company in the same manner as if the company were a company registered under Part I. of the Companies Act, 1862, with such memo-

randum and articles of association, and the company's deed of settlement shall cease to apply to the company.

If a company makes default in delivering to the registrar any document required by the Act to be delivered to him the company shall be liable to a penalty not exceeding ten pounds for every day during which it is in default.

<sup>(1)</sup> Companies Act, 1862, ss. 14, 15.

<sup>(2)</sup> *Ashbury Co. v. Riche*, L. R. 7 H. L. 668; and see *Wood v. Odessa Waterworks Co.*, 42 Ch. D. 636; *Re Crown Bank*, 44 Ch. D. 634.

<sup>(3)</sup> Companies Act, 1862, s. 16.

<sup>(4)</sup> *Browne v. La Trinidad*, 37 Ch. Div. 1, at p. 14; *Eley v. Positive Assurance Co.*, 1 Ex. Div. 88. See also

Articles of  
association.

The regulations of the company contained in its articles of association may from time to time be modified or added to by special resolution <sup>(1)</sup>.

Every company is bound under penalty to supply its members on demand, and upon payment of a small fee, with copies of the memorandum and articles of association <sup>(2)</sup>, and also to keep a register of its members <sup>(3)</sup>, and, if limited, a register of mortgages, open for inspection <sup>(4)</sup>, and to give notice to the Registrar of Joint Stock Companies as to the disposition or conversion of its shares <sup>(5)</sup>, and also annual returns as to its members and capital <sup>(6)</sup>.

The company when formed cannot act in its own person, for it has no person. It can act only through its directors <sup>(7)</sup>. The subscribers to the memorandum are, according to the model set of articles contained in Table A, to be deemed directors until directors are appointed <sup>(8)</sup>. A general meeting must be held within four months after registration <sup>(9)</sup>, and the shareholders themselves have then power to elect a new directorate.

An irregularity in the appointment of directors would not affect dealings with strangers who were ignorant of it <sup>(10)</sup>, but as between the company and its members an irregularity has been held to avoid a call <sup>(11)</sup> and a forfeiture of shares <sup>(12)</sup>.

But directors *de facto* are liable in the same manner and to the same extent as if they had been *de jure* as well as *de facto* directors <sup>(13)</sup>.

Position of  
directors.

What is the position of the directors of a joint stock company? Their general position has been judicially summed up by two of the greatest judges of modern times (the late Sir George Jessel and the late Lord Justice James <sup>(14)</sup>) as follows:—  
“Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners.

*Re Rotherham Chemical Co.*, 25 Ch. D. 103; *Re Wheal Buller Consols*, 38 Ch. D. 42.

<sup>(1)</sup> Companies Act, 1862, s. 50.

<sup>(2)</sup> Companies Act, 1862, ss. 19, 54.

<sup>(3)</sup> Companies Act, 1862, s. 25.

<sup>(4)</sup> Companies Act, 1862, s. 43.

<sup>(5)</sup> Companies Act, 1862, ss. 28, 53.

<sup>(6)</sup> Companies Act, 1862, ss. 26, 27.

<sup>(7)</sup> *Ferguson v. Wilson*, L. R. 2 Ch. 77.

<sup>(8)</sup> Art. 53.

<sup>(9)</sup> Companies Act, 1867, s. 39: see *Lord Claud Hamilton's Case*, L. R. 8 Ch. 548.

<sup>(10)</sup> *Mahony v. East Holyford Min-*

*ing Co.*, L. R. 7 H. L. 869.

<sup>(11)</sup> *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; *York Tramways Co. v. Willows*, 8 Q. B. D. 685; *London and Southern Land Co.*, 31 Ch. D. 223.

<sup>(12)</sup> *Garden Gulley United Mining Quartz Co. v. McLister*, 1 App. Cas. 39.

<sup>(13)</sup> *Coventry and Dixon's Case*, 14 Ch. D. 670.

<sup>(14)</sup> Sir George Jessel in *In re Forest of Dean Coal Mining Co.*, 10 Ch. D. 451, 453; and Lord Justice James in *Smith v. Anderson*, 15 Ch. D. 275.

It does not much matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it. The distinction between a director and a trustee is an essential distinction, founded on the very nature of things. A trustee is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. The same individual may fill the office of director and also be a trustee having property, but that is a rare, exceptional, and casual circumstance. The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal, that is, for the company of whom he is a director, and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he exceeds his authority. That seems to me to be the broad distinction between trustees and directors" (1).

"With respect to the capital of the company," said Kay, J., in a very recent case, "which is under their management, it has been said that directors are *quasi*-trustees for the company (2). In that and other respects they are to a certain extent trustees." They are certainly not trustees in the sense of those words as used with reference to an instrument of trust, such as a marriage settlement or will. One obvious distinction is that the property of the company is not legally vested in them. Another perhaps still broader difference is that they are the managing agents of a trading association and such control as they have over its property and such powers as by the constitution of the company are vested in them are confided to them for purposes widely different from those which exist in the case of such ordinary trusts and require that larger discretion should be given to them" (3).

The practical result is this: Directors are special agents of the company. Their authority is limited by the articles of asso-

(1) Directors are trustees or agents of the company—trustees of the company's money and property—agents in the transactions which they enter into on behalf of the company: Per Lord Selborne, *Great Eastern Ry. Co. v. Turner*, L. R. 8 Ch. 152.

(2) *Flitcroft's Case*, 21 Ch. D. 519, 534. See also *Great Eastern Railway Co. v. Turner*, L. R. 8 Ch. 149; *Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. 474; *British Seamless Paper Box Co.*, 17 Ch. D. 467, 479.

(3) *Re Faure Electric Co.*, 40 Ch. D. 150.

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ciation <sup>(1)</sup>, and where these are silent they have a general authority to bind the company in all things ordinarily and reasonably done in carrying on the defined and legitimate business of the company <sup>(2)</sup>. Directors are personally liable for any act, even though done *bonâ fide*, which is foreign to or inconsistent with the ordinary scope of the company's business as defined by the memorandum of association. If directors apply money of the company for purposes so outside its powers that the company could not sanction such application, they may be made personally liable as for breach of trust <sup>(3)</sup>. On the other hand, if they apply the money of the company, or exercise any of its powers in a manner which is not *ultrâ vires*, then a strong and clear case of misfeasance must be made out against them <sup>(4)</sup>. Directors are bound to act honestly and to use reasonable diligence, but they are not bound to do more <sup>(5)</sup>.

Every limited company is bound to keep a register, and enter therein, all mortgages and charges specifically affecting its property. This register, which is to be open to the inspection of creditors and members of the company, is to contain a short description of the property mortgaged or charged, the amount of the charge created, and the names of the mortgagees or persons entitled to the charge, and any director, manager, or officer who knowingly authorises or permits the omission of an entry on such register of any such charge is liable to a penalty not exceeding £50 <sup>(6)</sup>. This section has been the subject of many decisions, and has given rise to some curious diversities of judicial opinion which may now however be considered, for practical purposes, as settled by a recent judgment of the House of Lords that the mere omission to register a charge, even in favour of a director, without concealment, does not invalidate the security as between the director and the other creditors of the company <sup>(7)</sup>.

A director is not a servant, and there is no implied contract

<sup>(1)</sup> *Ernest v. Nicholls*, 6 H. L. C. 419; *Mahony v. East Holyford Railway Co.*, L. R. 7 H. L. 869; *Chapleo v. Brunswick Building Society*, 6 Q. B. D. 696.

<sup>(2)</sup> *Hutton v. West Cork Railway Co.*, 23 Ch. Div. 654.

<sup>(3)</sup> *Re Faure Electric Co.*, Kay, J., 40 Ch. D. 141, 150, 152. See also *West London Bank v. Kitson*, 13 Q. B. D. 360.

<sup>(4)</sup> See *Marzett's Case*, 28 W. R. 542; *Overend Gurney & Co. v. Gibb*, L. R. 5 H. L. 480. But see *Joint*

*Stock Discount Co. v. Brown*, L. R. 8 Eq. 396; *Pickering v. Stephenson*, L. R. 14 Eq. 322, 342; and *Land Credit Co. v. Lord Fermoy*, L. R. 5 Ch. 763.

<sup>(5)</sup> Per Jessel, M.R., *Re Forest of Dean Coal Mining Co.*, 10 Ch. D. 452. They are not liable for an honest error of judgment: *Re Brighton Brewery Co.*, 37 L. J. (Ch.) 278.

<sup>(6)</sup> Companies Act, s. 43; see as to debentures, *ante*, p. 283.

<sup>(7)</sup> *Wright v. Horton*, 12 App. Cas. 371.

to pay for his services (1). If a remuneration is fixed by the articles he can recover it by action (2), or a general meeting may vote remuneration for past services, but he will not be allowed to prove for the amount in the winding-up in competition with the general creditors (3).

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As a director occupies a fiduciary position (4) he must not so act as to allow his duty and his interest to conflict. If, therefore, he, without the fullest knowledge of the company, receive any secret profit, bonus, percentage, or commission from any transaction in which the company has an interest, he will be guilty of a fraud and a breach of duty, and he may not only be dismissed from his office, but he will also be compelled to account for the profit received.

The prospectus issued to the public is the basis of the contract to take shares (5).

A very important Act "to amend the law relating to the liability of directors and others for statements in prospectuses and other documents soliciting applications for shares or debentures" was passed in the year 1890, which is called the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64). The Act was passed in consequence of the decision in *Derry v. Peek*, which has been mentioned in a previous page (*ante*, p. 494). Sect. 3 provides; that where, after the passing of the Act (18th August, 1890), a prospectus or notice invites persons to subscribe for *shares in*, or *debentures* or *debenture stock* of, a company, the following classes of persons, viz.:—

1. Every person who is a director of the company at the time of the issue of the prospectus or notice ;
2. Every person who having authorised such naming of him is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company either immediately or after an interval of time ;
3. Every promoter of the company ; and
4. Every person who has authorised the issue of the prospectus or notice,

(1) *Hutton v. West Cork Railway Co.*, 23 Ch. D. 671.

(2) *Dunston v. Imperial, &c., Co.*, 3 B. & Ald. 125; *Orton v. Cleveland Firebrick Co.*, 3 H. & C. 868.

(3) *Ex parte Cannon*, 30 Ch. D. 632.

(4) *Boston Co. v. Ansell*, 39 Ch. D. 339; *Rothschild v. Brookman*, 2 Dow. & C. 189, 197; *Parker v.*

*McKenna*, L. R. 10 Ch. 96; *Aberdeen Railway v. Blaikie*, 1 Macq. 461; *Cavendish Bentinck v. Fenn*, 12 App. Cas. 653.

(5) *Pulsford v. Richards*, 17 Beav. 87; *Jennings v. Broughton*, 17 Beav. 234, where the prospectus is spoken of as a representation "*dans locum contractui*."

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shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, *unless it is proved*—

- (a) With respect to every such untrue statement *not purporting* to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of allotment of the shares, debentures, or debenture stock, as the case may be, believe that the statement was true; and
- (b) With respect to every such untrue statement *purporting* to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an engineer, valuer, accountant, or other expert, that it fairly represented the statement made by such engineer, valuer, accountant, or other expert, or was a correct and fair copy of or extract from the report or valuation: Provided always, that notwithstanding that such untrue statement fairly represented the statement made by such engineer, valuer, accountant, or other expert, or was a correct and fair copy of an extract from the report or valuation, such director, person named, promoter, or other person, who authorised the issue of the prospectus or notice as aforesaid, shall be liable to pay compensation as aforesaid, if it be proved that he had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it; and
- (c) With respect to every such untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of such statement or copy of or extract from such document,

*or unless it is proved* that having consented to become a director of the company he withdrew his consent before the issue of the prospectus or notice, and that the prospectus or notice was issued without his authority or consent, or that the prospectus or notice was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public



notice that it was so issued without his knowledge or consent, or that after the issue of such prospectus or notice and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and caused reasonable public notice of such withdrawal, and of the reason therefor, to be given <sup>(1)</sup>.

The liability of members of the company may be unlimited or limited <sup>(2)</sup>. If limited, the liability may be limited to the amount, if any, unpaid on the shares, in which case the company is said to be limited by shares, or the liability may be limited to the amount which the members may respectively undertake by the memorandum of association to contribute to the assets in the event of the company being wound-up, in which case the company is said to be limited by guarantee. The liability of the directors, or managers, or managing director of a limited company may however be unlimited <sup>(3)</sup>. To constitute a contract to take shares in a company there must be an application for the shares, and an allotment and a communication of the allotment to the applicant <sup>(4)</sup>. Share is a term which indicates simply a right to participate in the joint profits of a particular joint stock undertaking <sup>(5)</sup>.

Liability of  
members.

Every company limited by shares is, as has already been pointed out (*ante*, p. 637), required to state in its memorandum of association the amount of capital with which it proposes to be registered, divided into shares of a certain fixed amount <sup>(6)</sup>. The capital may be varied (1) by the issue of new shares;

Capital.

(1) 53 & 54 Vict. c. 62, s. 3. The same section also provides that—

(2) A promoter in this section means a promoter who was a party to the preparation of the prospectus or notice, or of the portion thereof containing such untrue statement, but shall not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company.

(3) Where any company existing at the passing of this Act, which has issued shares or debentures, shall be desirous of obtaining further capital by subscriptions for shares or debentures, and for that purpose shall issue a prospectus or notice, no director of such company shall be liable in respect of any statement therein, unless he shall have authorised the issue of such prospectus or notice, or have adopted or ratified the same.

(4) In this section the word

“expert” includes any person whose profession gives authority to a statement made by him.

Section 4 provides an indemnity against damages, costs, charges and expenses in favour of any person whose name has been improperly inserted as a director. The general principle of the law as already pointed out (*ante*, p. 451), is that there is no contribution between tort-feasors, but sect. 5 of the Directors' Liability Act, 1890, provides that a person liable under the Act shall be entitled to recover contribution “as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment.”

(2) Companies Act, 1862, s. 7.

(3) 30 & 31 Vict. c. 131, ss. 4–8.

(4) *Townsend's Case*, 13 Eq. 148.

(5) Per James, L.J., *Morrice v. Aylmer*, L. R. 10 Ch. 155.

(6) Companies Act, 1862, s. 8 (5).

(2) by dividing and consolidating the existing shares into shares of a larger amount; (3) by converting paid-up shares into stock (1); and under the Companies Acts, 1867 and 1877, the capital may be reduced (2).

The capital is the fund to which the creditors have a right to look as that out of which they are to be paid, and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out except in the legitimate course of business. A limited company is, therefore, prohibited from purchasing its own shares; from issuing shares at a discount; from the payment of brokerage or commission for placing its shares; because it would "in effect be *altering* the amount of the capital of the company in a manner not authorized by the Joint Stock Companies Act" (3).

The Court, as was stated by the late Lord Justice James, adheres strictly to the well-established authorities of long standing (4) that it will not interfere with the internal disputes of shareholders as to the management of the company, unless there be something illegal, oppressive, or fraudulent; unless there is something *ultra vires* on the part of the company *qua* company, or on the part of a majority of the company, so that they are not fit persons to determine it (5). An individual shareholder may then interfere.

Transfer of  
shares.

The subject of transfers of shares in joint stock companies may be now briefly considered. When joint stock companies were established the great object of the legislature, as was stated by Blackburn, J., was that the shares should be capable of being easily transferred. Provision was accordingly made that a register of the members should be kept, and that the transfers of shares should be then registered according to the regulations of the articles of association. The Court has power under sect. 35 of the Companies Act to rectify improper entries or omissions of entry in the register. The right to transfer shares is, in the absence of special provision forbidding it or

(1) Companies Act, 1862, s. 12. See *Campbell's Case*, L. R. 9 Ch. 1; *Taylor v. Pilsen, Joel, & Co.*, 27 Ch. Div. 268.

(2) And see 43 Vict. c. 19 as to return of accumulated profits.

(3) *Lydney Co. v. Bird*, 31 Ch. Div. 328; 33 Ch. Div. 85; *Re Faure Co.*, 40 Ch. D. 157; *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349, 375; *Trevor v. Whitworth*, 12

App. Cas. 409, 423; *Re Almada and Tiritto Co.*, 38 Ch. D. 415; *Re Addlestone Linoleum Co.*, 37 Ch. Div. 192; *Re Zoedone Co., Limited. Ex parte Higgins*, 60 L. T. (N.S.) 383.

(4) *Mozley v. Alston*, 1 Ph. 790; *Foss v. Harbottle*, 2 Hare, 461.

(5) *MacDougall v. Gardiner*, 1 Ch. Div. 13, 21; *Harben v. Phillips*, 23 Ch. D. 39.

special equity, incident to any shareholder, whether he be a director or not (1). Transfer of shares.

Where there is a general discretion vested in the directors as to transfers the directors are not bound to give reasons for refusing to register the transfer, and the Court will not interfere, unless it can be proved affirmatively that they are exercising their power capriciously. The directors may practically say, "We decline to allow the transfer, unless you undertake to be liable for future calls" (2). In a case where a large shareholder transferred some of his shares to one person for value, and other shares to another person as trustee for himself in order to increase his voting power, and the directors refused to approve of the transfer, not from any personal objection to the transferees, the Court ordered the transfer to be carried into effect (3).

The company is not bound to register a transfer at once. The directors are entitled to delay for a reasonable time, and to make reasonable inquiries before registering, and to communicate with the registered holder; and it is the general practice to delay the registration at least till there has been an opportunity given to the registered holder to answer a letter of advice telling him that a transfer has been lodged (4).

Upon the death of a shareholder, his personal representatives may transfer the shares or other interest of the deceased. The presumption of law, as was laid down in a celebrated case (5), is that the executors of a deceased shareholder succeed to the full liability as well as to the rights of the testator. Death of shareholders.

The executor has generally two courses open to him. He may either become a shareholder or not. There must be a distinct and intelligent request on the part of the executor that the testator's shares should be transferred into his name (6), for he should have a reasonable opportunity of transferring them should he desire to do so. When, however, the shares are put into the names of executors individually, although they have a right of indemnity against the estate, they are liable personally, and they cannot say that their liability is to be only a liability to the extent of the assets of the testator (7).

(1) *Bahia and San Francisco Railway Co.*, L. R. 3 Q. B. 581, 595; 25 & 26 Vict. c. 89, sect. 35; *Re Cawley & Co.*, 42 Ch. D. 209.

(2) *Robinson v. Chartered Bank*, L. R. 1 Eq. 32; *Ex parte Penney*, L. R. 8 Ch. 446, 452.

(3) *Moffatt v. Farquhar*, 7 Ch. D. 591; *Pender v. Lushington*, 6 Ch. D. 70; *Re Stranton Steel Co.*, L. R. 16 Eq. 559.

(4) *Société Générale de Paris v. Walker*, 11 App. Cas. 41.

(5) *Baird's Case*, L. R. 5 Ch. 725.

(6) *Buchan's Case*, 4 App. Cas. 589; *Muir v. City of Glasgow Bank*, 4 App. Cas. 337; *Barton v. London and North Western Railway Co.*, 24 Q. B. D. 77.

(7) *Duff's Executors' Case*, 32 Ch. Div. 309.

When shares are held by two or more persons, they are joint tenants, and upon the death of one the shares vest in the survivors with all their benefits and liabilities <sup>(1)</sup>.

Forfeiture  
of shares.

Shares may be forfeited if the regulations of the company so provide. The company's power, however, to enforce a forfeiture is treated as a matter *strictissimi juris*; and any irregularities, the least as well as the greatest, or oppression, or any want of *bona fides* or collusion, may invalidate the forfeiture <sup>(2)</sup>.

Surrender  
of shares.

There is no reference in the Acts to surrenders of shares; but these have been admitted by the Courts upon the principle that they have practically the same effect as forfeiture, the main difference being that one is a proceeding against the will of the shareholder, *in inritum*, as it is termed, and the other a proceeding taken with the assent of the shareholder, who is unable to retain and pay future calls on his shares <sup>(3)</sup>.

And now having considered the nature of a joint-stock company, the manner in which it is formed, the mode in which its business is conducted, and generally the circumstances under which its legal existence is begun and continued, it will be appropriate for us, remembering that "death closes all," to consider how that existence may be terminated.

Modes of  
winding-up  
companies.

A company registered under the Act of 1862, or under the former Acts of 1856–1858, may now be wound up in any of the following ways:—

- (1) By the Court;
- (2) Voluntarily, without the intervention of the Court;
- (3) Voluntarily, but under an order and subject to the supervision of the Court <sup>(4)</sup>.

<sup>(1)</sup> *Hill's Case*, L. R. 20 Eq. 585.

<sup>(2)</sup> *Clarke v. Hart*, 6 H. L. C. 633; *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687; *Stanhope's Case*, L. R. 1 Ch. 169.

<sup>(3)</sup> *Trevor v. Whitworth*, 12 App. Cas. 429. It is provided by the Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 35, that "a transfer of shares made for the purpose of getting rid of the further liability of a shareholder, as such, for a nominal or no consideration, or to a person without any apparent pecuniary ability to pay the reasonable expenses of working a mine, or to a person in the menial or domestic service of the transferor, shall be presumed to be a fraudulent transfer, and need not be recognised

by the company or by the Court on the winding-up of the company, whether the company be a registered or unregistered company;" see *In re Wheel Unity Wood Mining Co.*, 15 Ch. D. 13.

<sup>(4)</sup> The most important distinction practically between these three modes is, that when the winding-up is by the Court, all the work is done under the direct superintendence of the chief clerk, the liquidators are agents of the Court, and if the company be insolvent, are trustees only for the creditors. In the case of a voluntary winding-up, everything is done by the liquidators without reference to the judge or his chief clerk, except as to questions of difficulty, or where

The law as to the winding-up of joint stock companies has been materially altered by the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), which came into operation on the 1st of January, 1891. The Act, however, only applies to companies wound-up under a compulsory order and not to winding up either purely voluntary or under supervision (s. 31 (2)). Sect. 1 provides that the courts having jurisdiction to wind up companies in England and Wales shall be the High Court, the Chancery courts of the counties palatine of Lancaster and Durham, the county courts and the Stannaries court.

Where the amount of the capital of a company paid up or credited as paid up *exceeds ten thousand pounds*, a petition to wind up the company or to continue the winding-up of the company under the supervision of the Court shall be presented to the High Court, *or*, in the case of a company situate within the jurisdiction of either of the palatine courts aforesaid, either to the High Court or to the palatine court having jurisdiction.

Where the amount of the capital of a company paid up or credited as paid up *does not exceed ten thousand pounds*, and the *registered office of the company is situate within the jurisdiction of a county court having jurisdiction under the Act*, a petition to wind up the company or to continue the winding-up of the company under the supervision of the Court shall be presented to that county court.

This is followed by special provisions with regard to the jurisdiction of the Stannaries courts and the county courts. With regard to the Stannaries courts it is provided that where a company is formed for working mines within the Stannaries and is not shown to be actually working mines beyond the limits of the Stannaries, or to be engaged in any other undertaking beyond those limits, or to have entered into a contract for such working or undertaking, a petition to wind up the company or to continue the winding-up of the company under the supervision of the Court shall be presented to the Stannaries court, whatever may be the amount of the capital of the

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it is necessary for the Court to exercise particular powers; the liquidators are trustees for the company, and the winding-up does not necessarily imply insolvency. Sect. 138 of the Companies Act contains a useful provision enabling liquidators or contributories in a voluntary winding-

up to apply to the Court to determine questions and exercise certain powers. In winding-up subject to the supervision of the Court, the liquidators are appointed by the company, but are subject to the control of the Court: Emden's Practice and Forms in Winding-up.

company and wherever the registered office of the company is situate.

With regard to the county courts, it is provided that the Lord Chancellor may by order exclude a county court from having jurisdiction under this Act, and for the purposes of such jurisdiction may attach its district, or any part thereof, to the High Court or to any other county court, and may revoke or vary any such order. In exercising his powers under this section the Lord Chancellor shall provide that a county court shall not have jurisdiction under this Act *unless it has for the time being jurisdiction in bankruptcy*.

Sub-sections 6 & 7 of the first section provide that "every Court having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court, and every prescribed officer of the Court shall perform any duties which an officer of the High Court may discharge by order of the judge thereof or otherwise in relation to the winding-up of a company.

"Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court."

"Subject to general rules and to orders of transfer, the jurisdiction of the High Court is to be exercised as the Lord Chancellor may from time to time by general order direct, either generally or in specified classes of cases, either by such judge or judges of the Chancery Division of the High Court as the Lord Chancellor may assign to exercise that jurisdiction, or by the judge who, for the time being, exercises the bankruptcy jurisdiction of the High Court." <sup>(1)</sup>

The general scope of the Act is to assimilate to a large extent the procedure in the winding-up of joint stock companies to that which exists in bankruptcy proceedings (*post*, p. 903). For the future, when a winding-up order is made the official receiver becomes by virtue of his office the provisional liquidator of the company, and continues to act until he or another person becomes liquidator and capable of acting as such. If any other person than the official receiver is appointed he is to be styled "liquidator," and not (as heretofore) "official liquidator." Among the special provisions of the Act which are similar to a large extent to those contained in the Bankruptcy Acts may be noticed those which deal with the power to appoint a special manager (sect. 5), meetings of creditors, appointment of com-

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<sup>(1)</sup> 53 & 54 Vict. c. 63, ss. 1, 2; see as to transfer of proceedings and special case (*post*, p. 739) for the opinion of the High Court, sect. 3.

mittee of inspection (sects. 6 and 9); and statements and reports as to the affairs of the company (sects. 7 and 8). Sect. 8 provides that where the Court has made an order for winding-up a company, the official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the Court—

Report on winding-up and proceedings thereupon.

- (a) As to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and
- (b) If the company has failed, as to the causes of the failure; and
- (c) Whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court.

The Court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company.

The official receiver shall take part in the examination, and for that purpose may, if specially authorised by the Board of Trade in that behalf, employ a solicitor with or without counsel.

The liquidator, where the official receiver is not the liquidator, and any creditor or contributory of the company may also take part in the examination either personally or by solicitor or counsel.

The Court may put such questions to the person examined as to the Court may seem expedient <sup>(1)</sup>.

(1) 53 & 54 Vict. c. 63, s. 8, subss. 1-6. The section contains the following further provisions with

regard to the examination:—

(7) The person examined shall be examined on oath, and it shall be

Other provisions of the Act which are deserving of attention are those which confer upon the Court a power to assess damages against delinquent directors, officers, and promoters of the company (*post*, p. 657), and those which direct payment of money into "the companies' liquidation account," to be kept by the Board of Trade with the Bank of England<sup>(1)</sup>.

Sect. 15 contains the following important provision with regard to information as to pending liquidations, which is to apply whether the winding-up of the company has commenced before or after the commencement of the Act:—

"If the winding-up of a company is not concluded *within one year* after its commencement, the liquidator of the company shall, at such intervals as may be prescribed, until the winding-up is concluded, send to the registrar of joint stock companies a statement in the prescribed form, and containing the prescribed particulars with respect to the proceedings in and position of the liquidation. Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof, or extract therefrom. But any person untruthfully so stating himself to be a creditor or contributory shall be guilty of a contempt of Court, and shall

his duty to answer all such questions as the Court may put or allow to be put to him. The person examined shall at his own cost, prior to such examination, be furnished with a copy of the official receiver's report, and shall also at his own cost be entitled to employ at such examination a solicitor with or without counsel, who shall be at liberty to put such questions to the person examined as the Court may deem just for the purpose of enabling that person to explain or qualify any answers given by him. Provided always, that if such person is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as the Court in its discretion may think fit. Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him. They shall also be open to the inspection

of any creditor or contributory of the company at all reasonable times.

(8) The Court may, if it thinks fit, adjourn the examination from time to time.

(9) A public examination under this section may, if the Court so directs, and subject to general rules, be held before any judge of county courts, or before any officer of the Supreme Court, being an official referee, master, registrar in bankruptcy, or chief clerk, or before any district registrar of the High Court named for the purpose by the Lord Chancellor, or in the case of companies being wound up by a Palatine court, before a registrar of that court, and the powers of the court under subsections six, seven and eight of this section may (except as to costs) be exercised by the person before whom the examination is held.

(1) 53 & 54 Vict. c. 63, s. 11. See as to investment of surplus funds, separate accounts, interest on balances, sects. 16, *et seq.*



be punishable accordingly on the application of the liquidator or of the official receiver."

The circumstances under which a company may be wound-up compulsorily are enumerated in the 79th section of the Companies Act, 1862, as follows:—

Compulsory winding-up.

(1) Whenever the company has passed a special resolution requiring the company to be wound-up by the Court.

(2) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year.

(3) Whenever the members are reduced in number to less than seven.

(4) Whenever the company is unable to pay its debts.

(5) Whenever the Court is of opinion that it is "just and equitable" that the company should be wound-up.

The company is to be deemed unable to pay its debts when a creditor to whom more than £50 is due has served a demand under his hand requiring payment, and the company has for the space of three weeks neglected to pay, or secure, or compound for the debt, whenever there is a judgment against the company unsatisfied in whole or in part, and whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts.

The application for a winding-up order may be made by (1) the company; (2) one or more creditors; (3) one or more contributories; (4) the holder of a policy in the case of an insurance company; (5) all or any of the above-mentioned parties may combine <sup>(1)</sup>.

The circumstances under which the existence of the company may be terminated by a voluntary winding-up are prescribed by the Legislature as follows:—

Voluntary winding-up.

(1) Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily:

(2) Whenever the company has passed a special resolution requiring the company to be wound up voluntarily:

(3) Whenever the company has passed an extraordinary reso-

(1) As a rule an unpaid creditor is entitled to an order *ex debito justitiæ*: *Bowes v. Hope Society*, 11 H. L. C.

389. See as to the question what companies may be wound up: *Emden on Practice, &c.*, 3rd ed. ch. iii.

lution <sup>(1)</sup> to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same.

Special  
resolution.

A special resolution is a resolution passed by the statutory majority of three-fourths at one meeting, and confirmed after the prescribed interval (which must be not less than fourteen days nor more than a month) at a second meeting <sup>(2)</sup>.

Extraordi-  
nary reso-  
lution.

An extraordinary resolution is a resolution which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution, but it is necessary for the validity of an extraordinary resolution, that it should have been specified in the notice summoning the meeting <sup>(3)</sup>.

Compul-  
sory  
winding-  
up.

A compulsory winding-up commences from the date of the presentation of the petition. A voluntary winding-up is deemed to commence at the time of the passing of the resolution to wind up, and in the case of a special resolution, from the passing of the confirmatory resolution <sup>(4)</sup>. It has been decided by a majority of the Court of Appeal, that where the voluntary winding-up of a company is superseded by an order for its compulsory winding-up, the winding-up is deemed to have commenced from the date of the presentation of the petition <sup>(5)</sup>. A winding-up under supervision commences from the passing of the resolution to wind up.

As a rule the Court will not at the instance of a contributory interfere with a voluntary winding-up by ordering it to be continued under supervision, unless the resolution to wind up has been obtained by fraud or undue influence, or unless the creditors appear to support the petition.

List of  
contribu-  
tories.

It is the duty of the Court as soon as may be after making a winding-up order to settle "a list of contributories," and to ascertain who are creditors. In this list those who are contributories in their own right are distinguished from those who are contributories as being representatives of or liable to the debts of others. The whole body of these contributories fall under two lists, the "A" list, which is settled as soon as possible, consisting of those who are members at the commencement of the winding-up; and the "B" list, consisting of those who have ceased to be members within a year of the commencement of the winding-up. The "B" list is not settled until it has been

<sup>(1)</sup> Sect. 129.

<sup>(2)</sup> Sect. 51, Companies Act, 1862;  
*Alexander v. Simpson*, 43 Ch. D. 139.

<sup>(3)</sup> Sect. 129, Companies Act, 1862.

<sup>(4)</sup> Sect. 130, Companies Act, 1862;

and see *Re West Cumberland, &c., Co.*,  
40 Ch. D. 361.

<sup>(5)</sup> *Re Taurine Co.*, 25 Ch. D.  
118.

shown that those on the "A" list, *i.e.*, the present members are unable to satisfy the debts of the company.

Holders of fully paid-up shares in a limited company not being under any liability to pay cannot be placed in the list of contributories unless they themselves desire to be placed there, in order that they may obtain a share of the assets that remain, after payment of all liabilities <sup>(1)</sup>.

The attention of the reader may now be directed to a few sections of the Companies Acts which are of paramount importance in the winding-up of companies.

The 25th section of the Companies Act, 1867, contains the following most important provision: "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies at or before the issue of such shares."

Companies  
Act, 1867,  
s. 25.

When in the course of the winding-up of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator or other officer of the company has misapplied or retained or become liable or accountable for any moneys or property of the company or been guilty of misfeasance or breach of trust in relation to the company, the Court may, on the application of the official receiver or of the liquidator of the company or of any creditor or contributor of the company, examine into the delinquent's conduct and notwithstanding that the offence is one for which the offender is criminally responsible, compel him to repay the money with interest or make such compensation as it thinks just <sup>(2)</sup>.

Companies  
Winding-  
up Act,  
1890,  
s. 10.

Among the extraordinary powers which are conferred upon the Court, it may be mentioned that sect. 115 of the Companies Act, 1862, contains a provision somewhat similar to that which applies in bankruptcy proceedings (*post*, p. 915), enabling the Court to summon before it any person suspected of having property of the company, or who may be deemed capable of giving information, and to require the production of any books, papers, &c., he may have <sup>(3)</sup>.

Sect. 115.

<sup>(1)</sup> See the cases on the subject of contributories, &c., summarised in Emden's Practice, &c., 3rd ed. pp. 253, and 281, *et seq.*, and see also *Re Jones, Lloyd & Co. Limited*, 41 Ch. D. 159.

<sup>(2)</sup> 53 & 54 Vict. c. 63, s. 10, superseding 25 & 26 Vict. c. 89, s. 165, now repealed.

<sup>(3)</sup> 25 & 26 Vict. c. 89, s. 115; see also ss. 85, 87, and 163 of the Companies Act, 1862, which are to be read together; as to the Court's power to restrain or allow proceedings: see Chadwyck Healey, Company Law and Practice, p. 531 *et seq.*

Reduction  
of capital.

Under the Companies Act, 1862, a company had no power to reduce its capital, but it may now be done under the provisions of the Acts of 1867 (30 & 31 Vict. c. 131, s. 9, *et seq.*), 1877 (40 & 41 Vict. c. 26), and 1880 (43 Vict. c. 19). It is doubtful whether a company has power to reduce some of its shares and not to reduce others <sup>(1)</sup>.

Joint Stock  
Companies  
Acts.

The law as to joint stock companies is now practically governed by a series of Acts which are to be cited as the Companies Acts, 1862—1890, 25 & 26 Vict. c. 89 (Companies Act, 1862); 30 & 31 Vict. c. 131 (Companies Act, 1867); 33 & 34 Vict. c. 104; 40 & 41 Vict. c. 26 (Companies Act, 1877); 42 & 43 Vict. c. 76; 43 Vict. c. 19; 49 Vict. c. 23; 53 & 54 Vict. c. 62 (Companies Memorandum of Association Act, 1890 (*ante*, p. 639); 53 & 54 Vict. c. 63 (Companies (Winding-up) Act, 1890 (*ante*, p. 651). The Directors' Liability Act, 1890 (53 & 54 Vict. c. 64 (*ante*, p. 645)), is to be construed as one with the Companies Acts, 1862 to 1890. <sup>(2)</sup>.

There are also the life assurance companies' Acts, 1870–1872, which contain very special legislation with reference to insurance companies. Allusion has already been made to them in connection with the subject of policies of insurance (*ante*, p. 276). Under these Acts the Court has, *inter alia*, power to take into account contingent or prospective liability under policies and other contracts, and to reduce the contracts on such terms as it considers just, instead of making a winding-up order.

The reader who desires further information with regard to the difficult and complicated law relating to Joint Stock Companies, of which it is of course impossible for us to speak adequately in a limited space, is referred to the following among other authorities:—Lindley on Companies, 5th ed., *passim*; Buckley on the Companies Acts, 6th ed.; Company

<sup>(1)</sup> *Re Union Plate Glass Co.*, 42 Ch. D. 513; see *Gatling Gun Co., Limited*, 43 Ch. D. 628.

<sup>(2)</sup> 46 & 47 Vict. c. 28, is repealed by 51 & 52 Vict. c. 62. The following recent cases on the subject of the law of companies are important:—*Re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99 (garnishee order against company not sufficient to support petition for winding-up); *Re New Eberhardt Co.*, 43 Ch. D. 118 (fully paid-up shares); *Alexander v. Simpson*, 43 Ch. D. 139

(insufficient notice of meeting); *Re Pyle Works Co.*, 44 Ch. D. 534 (mortgage of uncalled capital); *Re Portuguese Consolidated Mining Co.*, 45 Ch. D. 16 (ratification of invalid allotment); *Colonial Bank v. Cady*, 15 App. Cas. 267 (blank transfers); *Re Empire Mining Co.*, 44 Ch. D. 402 (sanction of Court to scheme of arrangement); *Re Bristol Joint Stock Bank*, 44 Ch. D. 703; *Re Crown Bank*, 44 Ch. D. 634 (grounds for petition); *Re Building Societies Trust, Limited*, 44 Ch. D. 140 (priority of petitions).

Law and Practice, by Chadwyck Healey, 2nd ed.; Emden's Practice and Forms in Winding-up Companies, 3rd ed.

In *Barton v. London and North Western Railway Co.* (1), Lord Justice Lindley pointed out that "there are two great parallel lines of legislation with regard to companies; one being that of the Companies Act, 1862, the other that of the Companies Clauses Act, 1845 (2). The provisions of these Acts are by no means alike, and it is always necessary in dealing with a company to look to the provisions of the particular Act by which it is governed."

### FRIENDLY AND BUILDING SOCIETIES.

In addition to the ordinary joint stock companies, *e.g.* railway, gas, dock and water companies, and companies under the Companies Acts, there are several other classes of societies, some incorporated, some not, which are known to the law, and which are for the most part regulated by statute. It is of course impossible in a work like the present to treat of these at any length, but it may be useful to say a word concerning the two principal ones, *viz.* Friendly Societies and Building Societies.

The purposes for which friendly societies may be established are very numerous, but practically, they are reducible to two: (1) The relief of members in sickness, and (2) the payment of a sum of money on death, generally for funeral expenses only. These societies are subject to a certain amount of control by the Registrar of Friendly Societies, by whom their rules are registered, and they are at present regulated by the Friendly Societies Acts of 1875, 1887, and 1888, 38 & 39 Vict. c. 60; 50 & 51 Vict. c. 56, and 51 & 52 Vict. c. 66, and by the Treasury Regulations framed under the authority of these Acts. (3)

Purposes  
for which  
established.

Building societies are societies formed for the purpose of raising a fund by the subscriptions of the members, which is then employed in making advances to such members as wish for them on the security of real or leasehold estate. These societies are either terminating or permanent. A terminating society is one which by its rules is to terminate at a fixed date, or when a particular result has been attained; a permanent society is one which has no such limit. Every society is governed by its

Building  
Societies,  
termina-  
ting and  
permanent.

(1) 24 Q. B. D. 87.

(2) See 51 & 52 Vict. c. 48, amended by 52 & 53 Vict. c. 37.

(3) For further information the reader is referred to Davis on Friendly Societies.

own rules, which, of course, vary indefinitely and form the contract by which the members are bound and their rights and liabilities determined. In regard to their legal *status* they are either (1) unincorporated or (2) incorporated. The former class consists of societies which were formed under and are still governed by the Act of 1836 (6 & 7 Wm. 4, c. 32), and the Acts incorporated therewith. The latter consists of societies governed by the Building Societies Act of 1874, and the subsequent Amending Acts of 1875, 1877, and 1884, being either societies established since 1874 or societies established under the old Act of 1836, but which have obtained a certificate of incorporation under the Act of 1874. The rules of every society must be certified by the Registrar of Friendly Societies, and the Treasury has issued a set of Regulations under the authority of the Building Societies Acts as in the case of the Friendly Societies <sup>(1)</sup>.

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(1) For the general law of building societies the reader is referred to Wurtzburg on the Building Societies Acts. The following are some of the more important cases on the subject: *Agnew v. Murray*, 9 App. Cas. 519 (borrowing power); *Cunliffe, Brooks, & Co. v. Blackburn and District Building Society*, 9 App. Cas. 857 (borrowing power); *Walton v. Edge*, 10 App. Cas. 33 (withdrawal); *Brownlie v. Russell*, 8 App. Cas. 235 (withdrawal); *Rosenberg v. Northumberland Building Society*, 22 Q. B. D. 373 (advanced members); *Tosh v. North British Building Society*, 11 App. Cas. 489; *Auld v. Glasgow Working Men's Building Society*, 12 App. Cas. 197; *Walker v. General Mutual Building Society*, 36 Ch. D. 777; *Western Suburban*

*Building Society v. Martin*, 17 Q. B. D. 609; *Andrew v. Swansea Cambrian Building Society*, 50 L. J. (Q.B.) 428; *Hosking v. Smith*, 13 App. Cas. 582; *Municipal Building Society v. Richards*, 39 Ch. D. 372; *Re Sheffield and South Yorkshire Building Society*, 22 Q. B. D. 470; *Neath Building Society v. Luce*, 43 Ch. D. 158; *Swaine v. Wilson*, 24 Q. B. D. 252. It has been decided that the funds of a benefit building society are not within sect. 3 of the Trustee Investment Act, 1889 (52 & 53 Vict. c. 32), and that therefore they cannot be invested in the securities thereby authorized: *Re National Permanent Mutual Benefit Building Society*, 43 Ch. D. 431.

## CHAPTER XII.

## SATISFACTION AND PERFORMANCE.

“Satisfaction,” according to a definition which was sanctioned by the House of Lords in their judgment in a great case <sup>(1)</sup> upon the subject, is “the donation of a thing with the intention that it is to be taken either wholly or in part in extinguishment of some prior claim of the donee.” Satisfaction generally arises in one of two ways:—

Definition.

First, when a father or person *in loco parentis* (i.e. filling the place of a parent) <sup>(2)</sup> makes a double provision for a child or person standing towards him in a filial relation.

When satisfaction arises.

(1.) The father or person *in loco parentis* first gives a legacy by his will, and then subsequently, e.g. on the marriage of the child, makes a provision for it.

(2.) The father, or person *in loco parentis*, on marriage, or on some other occasion, agrees to make a provision for the child, and then subsequently makes a bequest to the child by will.

Secondly, when a debtor confers by will or otherwise a pecuniary benefit on his creditor.

The principles on which the Court proceeds in cases of this description have been well stated as follows:—

Principles on which the Court proceeds.

Looking at the ordinary dealings of mankind, the Court concludes that the parent does not, when he makes that advancement, intend the will to remain in full force, and that he has satisfied in his lifetime the obligation which he would otherwise have discharged at his death; and having come to that conclusion, as the result of general experience, the Court acts upon it, and gives effect to the presumption that a double provision was not intended. If, on the other hand, there is no such relation either natural or artificial, the gift proceeds from the mere bounty of the testator, and there is no reason within the

(1) *Lord Chichester v. Coventry*, L. R. 2 H. L. 71-95.

(2) The legal test whether a person has placed himself *in loco parentis* to another is whether he has taken upon

himself the duty of making a provision for him: *Ex parte Pye*, 18 Ves. 140, approved of in *Powys v. Mansfield*, 3 My. & Cr. 359, 367.

knowledge of the Court for cutting off anything which has in terms been given <sup>(1)</sup>.

*Tussaud v.  
Tussaud.*

In a leading case on the subject, a Mr. Tussaud had covenanted on the marriage of his daughter, Mrs. White, that his executors or administrators would within six calendar months after his own death, if he survived his wife, but if not, within six calendar months after his wife's death, transfer to the trustees of his daughter's settlement a sum of £2000 consols, to be held on certain elaborate trusts for the benefit of his daughter, her husband, and children. Mr. Tussaud paid the trustees £1000, which they accepted in part discharge of his liability to them. On his death some years afterwards it was found that he had made a will by which he had left £2800 on certain trusts for the benefit of Mrs. White and her children. The Court of Appeal <sup>(2)</sup> considered that the trusts for the benefit of Mrs. White and her children in the will were so widely different from those in the settlement, that the £2800 legacy ought not to be regarded as given in satisfaction for the £1000 still due from Mr. Tussaud, and they decided that Mrs. White and her family were entitled to *both* benefits, to wit, the benefit of the covenant by her father contained in the marriage settlement and the legacy given by his will.

"I can conceive," said Lord Colonsay, in delivering judgment in the House of Lords in the great case of *Lord Chichester v. Coventry*, "no consideration more important upon a question of double portions, than the consideration of whether the parties to be benefited by the one are the same as the parties to be benefited by the other, or whether the nature of the benefit conferred in the one case is the same as the nature of the benefit conferred in the other." Slight differences, however, between the two provisions, are not sufficient to rebut the presumption of satisfaction.

Is parol evidence of the intention of the testator or settlor admissible with reference to the presumption of satisfaction? The Court of Appeal, in the leading case to which we have previously referred, cited with approval the statement of the law on this subject which is contained in Taylor on Evidence. The rule is as follows:—

Statement  
of the law.

"Where there are two instruments and where the circumstances are such that the Court raises a presumption that one is

<sup>(1)</sup> *Suisse v. Lowther*, 2 Hare, 424, 435.

<sup>(2)</sup> *Tussaud v. Tussaud*, 9 Ch. D. 363,

and see Brett's Leading Cases, p. 253, where the authorities are reviewed.



in satisfaction of the other, there the Court will receive evidence of declaration of the parties to rebut such presumption, and to shew that such presumption is not in accordance with the intention of the author of the gift, and when evidence is admissible to rebut the presumption of law, counter-evidence is admissible in support of the presumption. On the other hand, where there is *primâ facie* no presumption in equity, there the Court will not allow evidence to be given to raise a presumption and to shew the intention of the parties." Parol evidence, in fact, to put the point shortly, is admissible to rebut, but not to raise the presumption of satisfaction.

Statement  
of the law.

A curious case on the law with regard to satisfaction came very recently before the Court of Appeal.

A separation deed had been entered into between husband and wife dated the 7th of September, 1844, by which the husband covenanted that his executors or administrators should, on his decease pay to his wife, if she survived him, £100. There was then a proviso in the deed that if £6 per month was paid her for six months from his death, the balance should only be paid at the end of that period.

The husband's will, which was dated the 5th of September, 1844, *i.e.* two days before the separation deed, but alleged to have been signed two days after it, contained the following clause:—

"After all my just debts, funeral and testamentary expenses are paid, I bequeath to my wife £100, payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100 as per indenture stated in our mutual separation." (1)

The Court of Appeal decided that the legacy was not to be taken in satisfaction of the amount payable under the covenant, but that the widow was entitled to both sums. The following principle was laid down: The circumstance that two documents are contemporaneous, so that both are present to the mind of the donor when he executes each of them, is a strong reason against holding a gift in one to be a satisfaction of an obligation under the other to pay a like sum. It is the duty of the Court to look at all the circumstances, and the relative positions of the two documents in point of time may be decisive, is often material, and is always relevant. In the present case the Court considered that the documents were so

(1) *Horlock v. Wiggins. Wiggins v. Horlock*, 39 Ch. Div. 142.

closely connected in point of time that they must be treated as contemporaneous, and both present to the donor's mind when he executed one of them, and that though the artificial presumption of satisfaction might be acted upon when the authorities were applicable, yet that it was not the duty of the Court to create fresh artificial presumption.

Satisfac-  
tion of  
debts by  
legacies.

With regard to the second head of the doctrine of satisfaction, viz. satisfaction of debts by legacies, the Court proceeds upon the principle *debitor non præsumitur donare*, and accordingly it has been well established by the authorities that if a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt.

The rule of presumption of satisfaction of debts by legacies has, however, as mentioned in Williams on Executors, "met with the censure of several eminent judges." The Court, as was said in a recent case, is not disposed "to hold there is satisfaction if it can help it, and has taken hold of slight circumstances to rebut the presumption." Thus the presumption of satisfaction shall not be made when the legacy is of less amount than the debt, or only given contingently or of an uncertain amount, where the debt was not contracted till after the making of the will, where the debt is due upon a current account "because the testator might not know on whose side the balance lay," where the debt is due upon a bill of exchange or other negotiable security <sup>(1)</sup>. In the case to which we have alluded, decided in 1888, a testator had bequeathed his wife a legacy of £625. At the time he owed her exactly that amount. The debt was paid off in his lifetime, and the Court decided that the payment of the debt must be taken as an ademption of the legacy <sup>(2)</sup>.

North, J., in delivering judgment, said: It is clearly established that if there is a legacy of equal amount with a debt, the creditor cannot take both the legacy and the debt unless there is something to take the case out of the general rule. In the present case there is nothing of the sort, and it seems to me that this legacy given by the codicil must be taken to have been given in satisfaction of the debt; and the presumption of law, in the absence of any evidence to rebut it, seems to me to put the matter in precisely the same position as if it had been stated

<sup>(1)</sup> Williams' Executors, 8th ed., 1302, where the authorities are collected, and see *Fairer v. Park*, 3

Ch. D. 309. *Re Huish*, 43 Ch. D. 260.

<sup>(2)</sup> *In re Fletcher*. *Gillings v. Fletcher*, 38 Ch. D. 373.

in the codicil that the legacy was to pay the debt. That being so, the testator having paid off the debt in his lifetime, his estate is relieved from the payment of the legacy.

It was decided in a case which came before the Court in 1889 <sup>(1)</sup> that a direction by a testator that his debts are to be paid is sufficient, without the further direction to pay legacies, to exclude the presumption that a legacy to a creditor equal to or exceeding the debt is a satisfaction of the debt.

### PERFORMANCE.

Closely connected with the doctrine of satisfaction, but at the same time to be distinguished from it, is the doctrine of performance. The distinction which is usually taken between the two is that in cases of satisfaction the thing which is substituted is different from that which was covenanted to be done, while in cases of performance the actual thing contemplated by the covenant is wholly or partially performed. The doctrine of performance is founded on the principle expressed in the maxim "equity imputes an intention to fulfil obligations." Accordingly where a man covenants to do something and he does that which wholly or partially carries out his covenant he is presumed to have acted with that intention.

Distinction between satisfaction and performance.

The doctrine of performance may be illustrated by the two old leading cases on the subject. In *Wilcocks v. Wilcocks* <sup>(2)</sup> a man covenanted on his marriage to purchase lands of the value of £200 a year, and settle them for the jointure of his wife, and to the first and other sons of the marriage in tail. He purchased lands of that value, and took a conveyance to himself in fee, and did not make any settlement. On his death his heir, who was also entitled under the settlement as eldest son, claimed the purchased lands as heir, and also to have the covenant performed by laying out an adequate portion of the personalty in the purchase of land. The Court decided that the lands descended were to be taken as a performance of the covenant.

Illustrations of performance.

In *Blandy v. Widmore* <sup>(3)</sup> a man previously to his marriage covenanted to leave his intended wife £620. He subsequently married and then died intestate, and the share which came to the wife under the Statute of Distributions was more than £620. It was decided that this amounted to a performance, and that accordingly the wife could not take her share under the intestacy, and claim the £620 under the covenant.

It has been decided that the circumstance that the money is

<sup>(1)</sup> *In re Huish*. *Bradshaw v. Huish*, 43 Ch. D. 260.

<sup>(2)</sup> 2 Vernon, 558.

<sup>(3)</sup> 1 Peere Williams, 324.

Following  
trust  
property.

to be paid under the covenant at some fixed period *within* a year while the share which is taken under the intestacy is not in strictness payable until a year has elapsed after the death of the person liable, does not rebut the presumption of satisfaction <sup>(1)</sup>.

A class of cases which is sometimes confounded with the doctrine of performance, but which differs essentially from it is that which arises when a *cestui que trust* follows trust property which has been converted into property of some other description <sup>(2)</sup>.

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(<sup>1</sup>) *Lee v. D'Aranda*, 1 Ves. Sen. 1, and other cases referred to; Williams on Executors, 8th ed. p. 1498, *et seq.*

(<sup>2</sup>) See *Trench v. Harrison*, 17

Simons, 111, and as to following trust property: *Re Hallett*. *Knatchbull v. Hallett*, 13 Ch. D. 696, *ante*, p. 531.

## CHAPTER XIII.

## ELECTION.

Election arises, to borrow Lord Eldon's language, where a donor gives what does not belong to him, but does belong to some other person, and gives that person some estate of his own. The donee whose property has been taken is then "put to his election" either to part with his own property, or if he prefers to take the gift to make compensation out of it to the disappointed party <sup>(1)</sup>. When election arises.

There is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them <sup>(2)</sup>.

The donee, when the intention of the donor is plain that he should not enjoy both benefits, cannot in fact blow hot and cold. He cannot, as was stated in a recent judgment of the Court of Appeal, be allowed to "approbate and reprobate," but if he approbates he must do all in his power to confirm the instrument which he approbates <sup>(3)</sup>. He cannot take both under and against the instrument—he must "elect."

The following illustration, which is substantially the same as that given by Lord Chancellor Cowper <sup>(4)</sup>, adapted to the language of modern times, may serve to make plain to the reader the general notion of what election is.

A testator, who is owner in fee of an estate in Surrey, and entitled to an estate tail in a farm in Middlesex, devises the Surrey farm to his eldest son and the Middlesex farm to the younger, and dies. The eldest son claims both gifts, the Surrey farm as devisee, and the Middlesex farm (which his father had no legal power to devise away from him) as heir in tail. Thereupon the Court says: "No, you shall make your '*election*' to claim either under or against your father's will. You shall not at the same time that you accept the Surrey farm as devisee

<sup>(1)</sup> *Broome v. Monck*, 10 Ves. 609.

<sup>(2)</sup> *Streatfield v. Streatfield*, 1 W. & T. leading cases.

<sup>(3)</sup> *In re Lord Chesham. Cavendish*

*v. Dacre*, 31 Ch. D. 466.

<sup>(4)</sup> Quoted in Haynes' *Outlines of Equity*, p. 260, 5th edition.

deprive your younger brother of the Middlesex farm by setting up your paramount title as issue in tail."

Summary  
of doctrine  
of election.

The general doctrine of election was well summed up by the late Master of the Rolls, Sir George Jessel, as follows: "Any disappointed legatee, or devisee, is entitled to say, 'You shall not take the benefit given to your estate by the will unless I have made up to me an equivalent benefit to that which the testator intended me to take.' Sometimes this is called the doctrine of compensation, which is the meaning of the doctrine of election as it now stands. The disappointed legatee or devisee may say to the other party, 'You are not allowed by a Court of Equity to take away out of the testatrix's estate that which you would otherwise be entitled to, until you have made good to me the benefit she intended for me.' That means that no one can take the property which is claimed under the will without making good the amount; or, in other words, as between devisees and legatees claiming under the will, the disappointed legatees are entitled to *sequester or to keep back* from the other devisees or legatees the property so devised and bequeathed until compensation is made. Thence arises the doctrine of an equitable charge or right to realize out of that property the sum required to make the compensation" <sup>(1)</sup>.

To this may be added from the same judgment:—"The presumption, in the absence of evidence to the contrary, is, that the testator by his will intends merely to devise or bequeath that which belongs to him, and that presumption is in favour of those who contend against the legatees. On the other hand, it is only a presumption which may be rebutted even by parol evidence; and it may be rebutted by evidence shewing that, under a misapprehension of law, the testator believed that the property which did not belong to him did really belong to him."

The doctrine of election applies to property of every kind, and to interests of every description <sup>(2)</sup>.

The general case in which it arises is with regard to wills, but it has also been held to apply to voluntary deeds, &c. <sup>(3)</sup>. It applies to the exercise of powers of appointment (*ante*, p. 175 <sup>(4)</sup>).

The law on this subject was summed up in 1886 as follows:

<sup>(1)</sup> *Pickersgill v. Rodger*, 5 Ch. D. 163.

<sup>(2)</sup> Watson's Compendium of Equity, 2nd ed. pp. 177-8.

<sup>(3)</sup> *Codrington v. Lindsay*, L. R.

8 Ch. 578-587, where the authorities are collected.

<sup>(4)</sup> *Whistler v. Webster*, 2 Ves. Jun. 367.

The usual practice where an infant

“When a person purports under a power of appointment to give property which is the subject of the power to persons who are not objects of the power, that is to say, in fact, to exercise a power which he has not got; if to the person who would be defeated by that gift free disposable property belonging to the testator is given by the same instrument that raises a case of election.”

Summary  
of doctrine  
of election.

“When a person, coming to claim under an instrument, says, if it be a will ‘pay me the legacy,’ or ‘hand over to me the particular property given to me by that instrument,’ the executors have the right to say ‘You must conform to all the provisions of the instrument.’ And if the instrument also disposes, or purports to dispose, of property which belongs by paramount title to the person claiming under it, a case of election arises, and he cannot take under it the benefit which it gives him, unless he is prepared to fulfil the gift which it purports to make of his own property. In short, the rule may be stated in this form, that no one can take under and against the same instrument, but taking under it is bound to fulfil all its provisions” (1).

This principle may be illustrated by a case decided a few years ago. A testator, who had power under a settlement to appoint certain settled hereditaments in favour of children of his first marriage only, appointed the settled hereditaments (which he described as his own property) in favour of a son of the first marriage, but subject to a charge in favour of his other children, including the children of his second marriage. He also devised property of his own to the same son, subject to the same charges in favour of his other children, his object being, as he said, “to equalize the shares of all his children in all his property.” The Court decided that a case of election arose in favour of the children of the second marriage (2).

Illustration.

A principle which is to be borne in mind in considering the doctrine of election is that, as was pointed out in an old case of *Bristowe v. Ward* (3), there must always be some free disposable

is concerned is to direct an enquiry what would be most beneficial for him. Sometimes the Court elects for the infant at once. In some cases the election has been postponed until the infant comes of age.

A married woman can, it seems, elect, but it would appear that she cannot do so as to bind after-acquired property except under sanction of the Court; see, as to election by married woman, *Re Whitwell*, W. N.,

1890, 171.

(1) See judgment of Kay, J., in *re Brooksbank*. *Beauclerk v. James*, 34 Ch. D. 163.

(2) *White v. White*, 22 Ch. Div. 555. See also *Wollaston v. King*, L. R. 8 Eq. 165; *Coutts v. Acworth*, L. R. 9 Eq. 519; *In re Swinburne*. *Swinburne v. Pitt*, 27 Ch. D. 696.

(3) *Bristow v. Warde*, 2 Ves. Jun. 336.

property given to the person, out of which a compensation can be made for what the testator takes away.

Election may be implied from acquiescence or conduct. In order, however, that election should be binding, it must be "by a person who has positive information as to his right to the property, and with that knowledge really means to give that property up" <sup>(1)</sup>.

In a case decided in 1889, it was laid down that election is obligatory when the additional benefit comes by operation of law, *e.g.*, by an adverse appointment failing for remoteness; but not where the additional benefit comes direct and in accordance with the intention of the appointor <sup>(2)</sup>.

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<sup>(1)</sup> *Dillon v. Parker*, 1 Swanston, 359; *Wilson v. Thornbury*, L. R. 10 Ch. 248. See further on the subject of election: *Re Vardon's Trusts*, 31 Ch. D. 275, where it was decided that no case of election arose: *Cooper*

*v. Cooper*, L. R. 7 H. L. 71; Brett's Leading Cases in Equity, 270, where the cases are reviewed.

<sup>(2)</sup> *Re Wells' Trust. Hardisty v. Wells*, 42 Ch. D. 646.



## CHAPTER XIV.

## DEALINGS WITH REVERSIONERS.

There is, as was stated in the leading case on the subject <sup>(1)</sup>, Dealings  
with re-  
versioners. “hardly any older head of equity than that under which the Court is enabled to relieve expectants or reversioners from unjust or ‘catching’ bargains which have been made with them. Formerly purchases of reversions were set aside if, in the opinion of the Court, the consideration was inadequate. A considerable change, however, was introduced into the law on this subject by the Act “to amend the law relating to sales of reversions,” which came into operation on the 1st of January, 1868, and provided that no purchase made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate should thereafter be opened or set aside *merely on the ground of under value*. The word purchase was defined by the Act to include “every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired” <sup>(2)</sup>. Sales of  
Reversion  
Act, 1868.

The present law with regard to dealings with reversioners, was very carefully considered by the Court of Appeal in *Aylesford v. Morris*, decided in 1873, and subsequently, by the House of Lords, in *O'Rorke v. Bolingbroke*, decided in 1877 <sup>(3)</sup>. In the former, the Court granted relief against the bargain into which the expectant heir had entered, and ordered the security to be given up on payment of the actual advance with 5 per cent. In the latter case, the seller of the reversion attained his majority on the 11th April, and executed the deed, assigning his reversionary interest on the last day of the same month. He never had a separate solicitor or any one to act for him in the character of an independent adviser. The majority of the House of Lords decided that as there was no evidence of fraud on the part of the purchaser the transaction could not be set aside. The present state of the law was, in

<sup>(1)</sup> *Earl of Aylesford v. Morris*,  
L. R. 8 Ch. 484, citing Lord Hard-  
wicke's decision in *Chesterfield v.*  
*Janssen*, 2 Ves. Sen. 127.

<sup>(2)</sup> 31 Vict. c. 4.

<sup>(3)</sup> *O'Rorke v. Bolingbroke*, 2 App.  
Cas. 814.

Sale of  
Reversion  
Act, 1868.

these cases, summed up as follows: The arbitrary rule of equity as to sales of reversions was an impediment to fair and reasonable, as well as to unconscionable bargains. Both have been abolished by the legislature, but the abolition of the usury laws leaves the nature of the bargain capable of being a note of fraud in the estimation of this Court, and the Act as to sales of reversion (31 Vict. c. 4), is carefully limited to purchases made *bonâ fide* and without fraud or unfair dealing, and leaves under-value still a material element in cases in which it is not the sole ground for relief. Those changes of the law have in no degree altered the *onus probandi* in those cases, which arise from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion or advantage taken of that weakness, a presumption of fraud. Fraud does not mean here deceit or circumvention, it means an unconscientious use of the power arising out of these circumstances and conditions, and when the relative position of the parties is such as *primâ facie* to raise the presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence proving it to have been in point of fact just and reasonable.

Commenting on the phrase “expectant heir,” which has been much employed in cases of this description, Sir George Jessel expressed himself: “The phrase is used, not in its literal meaning, but as including every one who has either a vested remainder or a contingent remainder in a family property including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor either by reason of his being the heir apparent or presumptive or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. More than this the doctrine as to expectant heirs has been extended to all reversioners and remaindermen. So that the doctrine not only included the class mentioned, who in some popular sense might be called ‘expectant heirs,’ but also all remaindermen and reversioners”<sup>(1)</sup>.

In a still later case decided in 1880, in which the plaintiff, the son of a nobleman possessed of large estates, who possessed no property of his own and no expectation of any except such general expectations as were founded on his father’s position, had obtained a loan at 60 per cent. interest. The Court came to

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(1) *Beynon v. Cook*, L. R. 10 Ch. 391, note.

the conclusion that the money had been lent without any thought on the part of the money-lender that he would be paid by the young man personally, but partly on the general expectation that the plaintiff would some day be entitled to the family estate, and partly in the hope that the father or friends would pay, so as to avoid exposure. The Court set aside the transaction, and ordered the defendant to pay the costs.

Cases as to  
dealings  
with re-  
versioners.

“The real question,” said the judge, “in every case, seems to me to be the same as that which arose in the case of expectant heirs and reversioners before the special doctrine in their favour was established—that is to say, whether the dealings have been fair, and whether undue advantage has been taken by the money-lender of the weakness or necessities of the person raising the money. Sometimes extreme old age has been unduly taken advantage of, and the transaction set aside. Sometimes great distress. Sometimes infancy has been imposed upon, and transactions, though ratified at the full age, have been set aside because of the original vice with which they were tainted. In every case the Court has to look at all the circumstances” (1).

In the last reported case bearing directly on this subject decided in 1888, the result of the decisions was stated to be that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction. This will be done even in the case of a property in possession, and *à fortiori* if the interest be reversionary. The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser when the transaction is impeached, the onus of proving in Lord Selborne’s words that the purchase was “fair, just and reasonable” (2).

The principles of the law as to dealing with reversioners and expectant heirs were also applied to a case which came before the Court in 1884. A young man in very poor circumstances, was defendant in a probate action in which he claimed a share of certain real estate as co-heir of the deceased. In order to enable him to conduct his defence he borrowed money from a solicitor to whom he executed a mortgage in which he covenanted to employ a particular person as his solicitor in the action, and if he should be successful in the action to pay a considerable sum “by way of bonus.” The deed also provided

(1) *Nevill v. Snelling*, 15 Ch. D. 679, where nearly all the previous authorities are collected.

(2) *Fry v. Lane. In re Fry. Whittle v. Bush*, 40 Ch. D. 312.

that the mortgagee should make such further advances to the mortgagor as and when the mortgagee should "think fit, to meet any further necessities of or to be applied in or towards the costs of the action." The deed then charged the mortgagor's interest in the real estate in question with present and further advances and interest, and the sum agreed on as "bonus." The Court decided (*inter alia*) that the transaction was voidable as an undue advantage obtained from the mortgagor when under pressure of distress, and in a condition analogous to an expectant heir, and ordered redemption of the mortgaged property on payment only of the actual advance with interest at 5 per cent. The judge also cited with approval the observations of one of his predecessors, that one noteworthy effect of the repeal of the usury laws was to bring into operation, to a greater extent than formerly, another branch of the jurisdiction of the Court of Equity which had existed long before them, viz., that founded on the principle that any oppressive bargain, or any advantage exacted from a man under grievous necessity and want of money, ought to be prevented by the Court from prevailing against him. "The moment the usury laws were repealed, and the lender of money became entitled to exact anything he pleased in the name of interest, from that moment the jurisdiction of the Court which prevailed independently of the usury laws, became likely to be called into active operation" (1).

The usual terms on which dealings with reversioners are set aside, are—

Repayment of the amount actually paid or advanced, with interest at 5 per cent. per annum.

The plaintiff is not usually allowed his costs, as the Court proceeds on the principle that he ought to pay for the relief which they grant him against the consequences of his own folly. If, however, the defendant has refused reasonable terms offered before the commencement of the action, or has been guilty of fraud or misconduct, the plaintiff may be allowed costs (2).

(1) *James v. Kerr*, L. R. 40 Ch. D. 449, 459, citing *Barrett v. Hartley*, L. R. 2 Eq. 789.

(2) The following cases, in addition to those which have been previously noticed, may advantageously be consulted on the subject of dealings with reversioners: *Croft v. Graham*, 2 De G. J. & S. 155; *Savery v. King*, L. R. 5 H. L. 627; *Webster v. Cook*, L. R. 2 Ch. 542. (In this case, decided in 1867, before the passing of the Sales of Reversion Act, the

borrower was entitled to the income of property subject to the payment of rent-charges and interest on mortgages, and the Court of Appeal considered that his interest was not a "reversion," and that therefore the transaction could not be set aside); *Miller v. Cook*, L. R. 10 Eq. 641; *Tyler v. Yates*, L. R. 11 Eq. 265; 6 Ch. 665; *Beynon v. Cook*, L. R. 10 Ch. 389; Brett's Leading Cases in Equity, p. 130, notes to *Earl of Aylesford v. Morris*.

Terms on which dealing with reversioners set aside.

It must be borne in mind in connection with this subject that impeachable transactions may be rendered valid by acts of confirmation, especially when of a formal character after advice taken, or acquiescence for a great length of time on the part of a person who is cognisant of his right to relief. Confirmation.

But confirmation or acquiescence will be of no avail whilst the reversioner continues in the same situation as when he entered into the contract, for in such cases it has always been presumed, that the same distress, which pressed him to enter into the contract, prevented him from coming to set it aside; it is only when he is relieved from that distress that he can be expected to resist the performance of the contract <sup>(1)</sup>.

It has already been pointed out that in dealing with reversionary interests, time is regarded as of the essence of the contract (*ante*, p. 583 <sup>(2)</sup>).

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<sup>(1)</sup> *Savery v. King*, L. R. 5 H. L. 627; *Beynon v. Cook*, L. R. 10 Ch. 391, note; *Fry v. Lane*, 40 Ch. D. 312.

391; *Hipwell v. Knight*, 1 Y. & C. Ex. in Eq. 401; *Patrick v. Milner*, 2 C. P. D. 342, where the reversionary interest in question was contingent.

<sup>(2)</sup> *Newman v. Rogers*, 4 Bro. C. C.

## CHAPTER XV.

DONATIO MORTIS CAUSÂ <sup>(1)</sup>.

Definition.

A *Donatio mortis causâ* is a gift of personal property "by a party who is in peril of death, upon condition, that it shall presently belong to the donee, in case the donor shall die, but not otherwise."

Essentials  
of *donatio  
mortis  
causâ*.

There are three essentials to the validity of a *donatio mortis causâ* :—

1. The gift must be with a view to the donor's death.
2. There must be an express or implied intention that the gift should only take effect on the donor's decease by his then existing disorder.
3. There must be delivery of the subject matter of the donation to the donee or some one on his behalf. The delivery must be absolute, *i.e.* the donor must not retain any control over the property, but it may be accompanied by a trust.

A *donatio mortis causâ* has been described by Mr. Story "as an *amphibious* gift between a gift *inter vivos* and a legacy" <sup>(2)</sup>. It resembles a legacy and differs from a gift *inter vivos* in the following respects: (1.) It is "ambulatory" and incomplete during the donor's life. It may be revoked by resumption or by the recovery of the donor from the same illness. It cannot, however, be revoked by a subsequent will, though it may be satisfied by a legacy. (2.) It may be made to the wife of the donor. (3.) It is subject to probate duty, and legacy duty. (4.) It is liable for debts on deficiency of assets.

A *donatio mortis causâ*, on the other hand, differs from a legacy in the following respects: (1.) It does not require probate, as it takes effect at once *sub modo* (*i.e.* conditionally), though as was pointed out it is now liable to probate duty <sup>(3)</sup>. (2.) It

<sup>(1)</sup> It has been recently decided that although the Common Law Divisions have jurisdiction to entertain an action to establish a *donatio mortis causâ*, even where the legal right has not passed to the donee; yet in such a case the action is more

properly instituted in the Chancery Division: *Cassidy v. Belfast Banking Co.*, 22 L. R. Ir. 68.

<sup>(2)</sup> Story's Equity Jurisprudence, 584.

<sup>(3)</sup> 44 & 45 Vict. c. 12, s. 38 (2), and see sects. 27, *et seq.*

requires no assent from the executor or administrator to perfect the donee's title.

Under the Customs and Inland Revenue Act, 1881 <sup>(1)</sup>, the personal or movable property to be included in an account, and thus rendered liable to the duties payable on affidavits in England and Ireland and inventories in Scotland, on probate and letters of administration, is to comprise "any property taken as a *donatio mortis causá* made by any person dying on or after the 1st of June, 1881.

Customs  
and Inland  
Revenue  
Acts.

The Customs and Inland Revenue Act, 1889 <sup>(2)</sup>, amending the Act to which we have just referred renders all property liable to probate duty which is taken as a *donatio mortis causá*, or taken under a voluntary disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *boná fide* made twelve months before the death of the deceased; or taken under a gift whenever made, of which property *boná fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforth retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

*Donationes mortis causá* have been held valid of—

Bank-notes.

Bills and promissory notes payable to the donor's order, though endorsed by him.

Bonds.

Deposit note given by a bank to the donor.

Keys, as affording the means of obtaining possession of the thing locked up.

Mortgages. Policies of insurance.

Receipts for money.

In a case decided in 1887 <sup>(3)</sup> it was held that a deposit receipt in the ordinary form used by banks may be the subject of a *donatio mortis causá*, and that though the receipt was expressed to be not transferable. It was pointed out that this case was identical with others which are noticed in the judgment, save in the one respect that the receipt contained the words "not transferable," but this point was regarded as immaterial. "The receipt of course," said the judge, "was not, and if these words were absent could not have been, negotiable in the sense of

Cases  
where  
*donationes  
mortis  
causá* held  
valid and  
invalid.

<sup>(1)</sup> 44 & 45 Vict. c. 12, s. 38.

<sup>(2)</sup> 52 Vict. c. 7, s. 11.

<sup>(3)</sup> *Cassidy v. Belfast Banking Co.*,  
22 L. R. Ir. 68.

conferring upon a transferee by indorsement a better title than that of his transferor. If that was intended to be effected by the words they were useless. If, on the other hand, the words were an attempt on the part of the bank to render the money secured by the receipt inalienable, they were void. The bank could not upon such a contract prevent the money of the deceased in their hands being assignable by him, or in the absence of assignment, passing to his personal representatives."

*Donationes mortis causâ* have, on the other hand, failed in respect of—

Receipts for stock. Cheques on the donor's own bank not presented before his death <sup>(1)</sup>.

A somewhat difficult case on the law of *donatio mortis causâ* was decided by the Court of Appeal last year. A testator by his will gave the income of his property to his wife in his last illness, and being in anticipation of death he signed the following document:—

"March 1, 1887. I give all my insurance money that is coming to me to my wife Hannah for her own use, as well as £200 in the bank. This is my wish." This document was signed by the husband but attested by only one witness, and was at his request placed with his will and remained there until his death in April, 1887. Evidence was admitted as to the circumstances attending the execution of the document. The Court of Appeal decided, reversing the decision of the Court of first instance, that the document was intended as a testamentary instrument, and not having been properly attested according to the Wills Act, could not take effect as a will, and also that effect could not be given to it as a *donatio mortis causâ* or as an immediate assignment of the property mentioned in it <sup>(2)</sup>.

The Court of Appeal, in delivering judgment said, "the document is, on the face of it, testamentary, and not being attested, as required by law, we cannot accept it, or we should be doing away with the Wills Act altogether. It has been argued that the gift, or so-called gift, may operate as a *donatio mortis causâ*; but this argument cannot succeed. If a chattel or a deposit note be handed over by a person in contemplation of death, so as to confer a complete title on the donee, there may be a good

<sup>(1)</sup> See further on this subject *In re Mead. Austin v. Mead*, 15 Ch. D. 65, where most of the previous cases are collected; *Clement v. Cheesman*, 27 Ch. D. 631; Williams on Executors, 8th ed., p. 776, *et seq.*

Brett's Leading Cases in Equity, p. 122; and see further on this subject: *Re Farman*, W. N. (1887) 252.

<sup>(2)</sup> *In re William Hughes*, 36 W. R. 821.



*donatio mortis causá*. But the subject of this alleged gift was not properly one, the evidence of title to which property passes by delivery, to which property alone, speaking generally, the doctrine of *donatio mortis causá* applies" (1).

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(1) See also *Re Dillon*. *Duffin v. Duffin*, 44 Ch. D. 77.

## CHAPTER XVI.

## SURETYSHIP.

The law with regard to the subject of suretyship has already been to some extent considered in that portion of this work which is devoted to contracts (*ante*, p. 375). A brief further notice of it on this subject would seem, however, to find its appropriate place in that portion of our work which is devoted to the principles of equity. In several points which now possess practically nothing more than an historical interest, the doctrines administered by the Court of Equity in respect of matters of suretyship, differed essentially from those administered by courts of common law <sup>(1)</sup>.

Prior to the Judicature Act, however, the rules of equity had in very many cases been adopted in the common law courts, and now in all cases of conflict between the two systems, the rules of equity are to prevail.

Rights of a  
surety in  
respect of  
disclosure.

What are the rights of a surety in respect of the disclosure to him of matters affecting the contract? The law on this subject was very carefully considered in a case which came before Lord Justice (then Mr. Justice) Fry in 1878. "The law on that point," said the judge, "seems to me to stand very much in this position. Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose, to shew that the duty existed. Now undoubtedly that duty does in many cases exist." It exists, the judge proceeded to state, where there is the relationship of agent and principal, solicitor and client, trustee and *cestui que trust*, and there are also contracts which are *uberrimæ fidei*, e.g., partnership, marine insurance, &c.

"It has been argued," continued Fry, J., "that the contract between the surety and the creditor, is one of those contracts which I have spoken of as being *uberrimæ fidei*, and it has been

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(1) See for a summary of the differences between the rules of law and equity, Smith's Principles of Equity, 2nd ed. p. 345.

said that such a contract can only be upheld in the case of there being the fullest disclosure by the intending creditor. I do not think that that proposition is sound in law. I think that, on the contrary, that contract is one in which there is no universal obligation to make disclosure, and therefore I shall not determine this case on that view" (1).

The same judge however went on to say, that he considered that the contract of suretyship was, as expressed by Lord Westbury, one which "should be based upon the free and voluntary agency of the individual who entered into it," and that in Lord Eldon's words "it was a contract in respect of which a very little was sufficient. Very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid."

It was laid down in the old leading case of *Dering v. Earl of Winchelsea*, decided more than one hundred years ago, that the doctrine of contribution between sureties is "bottomed and fixed" on general principles of justice, and does not spring from contract, though contract may qualify it. It is the result of general equity on the grounds of equality of burdens and benefit. Accordingly in that case it was decided that where three sureties were bound by different instruments for different amounts, but for the same principal and the same engagement, they were all bound to contribute.

Doctrine of contribution.

It must be borne in mind that, as was pointed out in a recent case, the equality here spoken of is not necessarily equality in its simplest form, but what has sometimes been called "proportionate equality." The ultimate burden, whatever it may be, must be borne by the co-sureties in proportion to the shares of the debt for which they have made themselves responsible. Each surety must bring into hotchpot every benefit which he has received in respect to the suretyship which he undertook (2).

It was a rule of equity that where there were several sureties and one became bankrupt, if another of them paid the entire debt he could in equity enforce a rateable contribution from his solvent co-sureties, while at common law he could only enforce from each a proportionate part having regard to the original

(1) Per Fry, J., in *Davies v. London and Provincial Marine Insurance Co.*, 8 Ch. D. 419: see *The North British Insurance Co. v. Lloyd*, 10 Ex. 523; *Hamilton v. Watson*, 12 C. & F. 109, 119.

(2) *Steel v. Dixon*, 17 Ch. D. 285, and notes thereto in Brett's Leading Cases in Equity, p. 259, *et seq.*, and see *Ramskill v. Edwards*, 31 Ch. D. 100, 109; *Berridge v. Berridge*, 44 Ch. D. 168.

number. Similarly where one surety died, at common law the only action for contribution was against the survivors, while in equity contribution could be enforced against the estate of the deceased surety. The rules of equity upon this point, as already pointed out, now prevail.

Contribution.

It has been decided that a surety is not entitled to call upon his co-surety for contribution until he has paid more than his proportion of the debt due to the principal creditor, even though the co-surety has not been required by the creditor to pay anything, provided that the co-surety has not been released by the creditor <sup>(1)</sup>.

Discharge of surety.

A surety may be discharged in a great many ways which are however reducible to three classes: (1) Where there has been misrepresentation, or where the creditor has omitted to disclose that which the Court considers that he ought to have disclosed. (2) Where the contract between the parties has been varied without the consent of the surety. Thus in a case where the surety had executed a bond under circumstances which practically amounted to a representation that it had been executed by his co-surety, and this was not the case, it was decided that the surety was discharged. (3) The surety may be discharged where the creditor enters into an arrangement without his consent, which materially affects his position <sup>(2)</sup>.

The law on this subject was well summarised by Lord Blackburn, then Mr. Justice Blackburn, as follows:—"It has been established for a very long time, beginning with *Rees v. Berrington* to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether. The reason given for this, as stated in *Samuell v. Howarth*, by Lord Eldon, is, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because

<sup>(1)</sup> *Ex parte Snowden. In re Snowden*, 17 Ch. D. 44.

<sup>(2)</sup> See De Colyar on Guarantees (2nd ed.), 323.

he in fact cannot have the same remedy against the principal as he would have had under the original contract. And he adds: "The creditor has no right, it is against the faith of his contract, to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety" (1).

When there is a release of the debtor, or time is given to the debtor, and the rights of the creditor against the surety are reserved, the surety is not discharged (2).

The subject of the reservation of the rights of the principal creditor against the surety may be illustrated by a case which came before the Court of Appeal in 1887 (3).

Reserva-  
tion of  
rights  
against  
surety.

The acceptor of a bill of exchange for £100 being sued thereon by the holders, paid into Court the sum of £30 in satisfaction of the whole cause of action. The holders then wrote to the acceptor to say that the indorsers had arranged to pay the balance of £70, and that they would sue the acceptor therefore. After writing this the holders of the bill gave due notice that they accepted the £30 in satisfaction of the claim in respect of which it had been paid into Court. It was decided that what had been done did not indicate any intention to give the acceptor an absolute discharge, but that on the contrary, all rights against him were reserved, and that accordingly the indorsers of the bill could sue the acceptor.

It is provided by the Mercantile Law Amendment Act, 1856, (19 & 20 Vict. c. 97), that a surety who pays off a debt secured to him by judgment or bond is entitled to have assigned to him every judgment, specialty, or security which shall be held by the creditor in respect of such debt, whether such securities shall or shall not at law be deemed to be satisfied by payment of the debt (4).

Mercantile  
Law  
Amend-  
ment Act,  
1856.

It was decided in an old case that, it being unreasonable that a man should "always have a cloud hanging over him," a surety is entitled as soon as the money is payable, though no action or proceedings be taken against him, to come to the Court and compel the principal to discharge the debt (5).

(1) Per Blackburn, J., in *Polak v. Everett*, 1 Q. B. D. 673; citing *Samuell v. Howarth*, 3 Mer. 272.

(2) *Green v. Wynn*, L. R. 4 Ch. 204, 206; *Owen v. Homan*, 4 H. L. C. 997; *Webb v. Hewitt*, 3 K. & J. 442.

(3) *Jones & Co. v. Whitaker*, 57 L. T. (N.S.) 216.

(4) See *Forbes*, *Forbes v. Jackson*, 19 Ch. D. 615, and cases there referred to; *Lightbown v. McMynn*, 33 Ch. D. 375, where it was held that

the surety's rights were not affected by the fact that he had not obtained actual assignment of the judgment.

(5) *Ranelagh v. Hayes*, 1 Vern. 189; *Wooldridge v. Norris*, L. R. 6 Eq. 410; *Hobbs v. Wayet*, 36 Ch. D. 256, 259, where the judge considered that directly the cloud appeared, however small the cloud might be, the man under liability was entitled to claim to be indemnified.

The law on the subject of the relations between principal and surety has been made the subject of consideration by the Courts on several occasions in recent cases. It has been decided that the rights of a surety against his principal are not exactly the same as those of the creditor. Accordingly, although the law is that a creditor who has recovered judgment against one partner cannot sue another partner, the rule does not take away the rights of a surety for one partner to sue another partner <sup>(1)</sup>. It was decided in a case which came before the Court in 1888 <sup>(2)</sup>, that a surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of his principal's estate. "What the Crown," the Court said, "could have recovered was payment of the debt in priority of the other creditors, and the surety is now entitled to that priority."

Surety to  
the Crown.

In a case decided in 1889, where an action was brought in respect of a mortgage debt against the personal representatives of a surety, it was decided that the payment of interest by the mortgagor prevented the Statute of Limitations from running in favour of the surety, and that the right of action against his estate was not barred <sup>(3)</sup>.

<sup>(1)</sup> *Baddeley v. Consolidated Bank*, 34 Ch. D. 536.

<sup>(2)</sup> *In re Lord. Churchill. Manisty v. Churchill*, 39 Ch. D. 174.

<sup>(3)</sup> *Re Frisby. Alison v. Frisby*,

43 Ch. D. 106. See *Re Wolmershausen*, 38 W. R. 537, a case under 21 Jac. 1, c. 16, where it was held that the surety was discharged and where *Re Frisby* is considered.

## CHAPTER XVII.

## PENALTIES AND FORFEITURES.

The principle upon which the Court proceeds in relieving against a penalty was well stated by Lord Thurlow (who pronounced it to be “too strongly established in equity to be shaken”) in a leading case <sup>(1)</sup> as follows:—“The rule is that, where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessorial, and therefore only to secure the damage really incurred.”

Principle  
on which  
the Court  
proceeds.

It has been long established that although the parties use the words “liquidated damages” or “penalty,” such words are not to be disregarded, but are by no means conclusive. Thus in the celebrated case of *Kemble v. Farren* <sup>(2)</sup>, where the sum of £1000 was declared by the agreement to be liquidated, and not a penalty or in the nature thereof, it was held to be a penalty, and Chief Justice Tindal in delivering judgment, said, “We see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum they may agree.”

The law on the subject of whether a sum of money payable on breach of a condition is to be treated as a penalty or as liquidated damages was much considered in a case which came before the Court of Appeal in 1882. In this case the law was summed up in a series of propositions of which the following are the most important:—

“Penalty”  
and “liqui-  
dated  
damages.”

Where a sum of money is stated to be payable either by way of liquidated damages or by way of penalty for breach of stipulations, all or some of which are, or one of which is for the payment of a sum of money of less amount, the sum stipulated to be paid is treated as penalty, only the actual damage can be recovered.

“Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which

<sup>(1)</sup> *Sloman v. Walter*, 1 Bro. C. C. 418.

<sup>(2)</sup> *Kemble v. Farren*, 6 Bing. 141.

may be for the payment of money on a given day, the bargain of the parties is to be carried out, and the sum is to be treated as liquidated damages."

Summary  
of the law.

It must also be steadily borne in mind that in cases of this description the law proceeds on the two following principles: (1) "that people must be trusted to make their own bargains," and that therefore it is the business of the Court to ascertain the intention; and (2) that regard is to be made to the principles established by decided cases. The law on this subject was well stated by Sir George Jessel as follows:—

"I have always thought, and still think, that it is of the utmost importance as regards contracts between adults—persons not under disability, and at arm's length—that the Courts of law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly-expressed intention on the ground that judges know the business of the people better than the people know it themselves" (1).

"If cases have laid down a rule that in certain events words are to have a particular meaning, and that has become a settled rule, it may be assumed that persons in framing their agreements have had regard to settled law, and may have purposely used words which, though on the face of them they may have a different meaning, they know by reason of the decided cases must bear a particular or special meaning."

When one lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification; but where the payments stipulated are made proportionate to the extent to which the contractors may fail to fulfil, or, in the language of Scotch law, "implement" their obligations, and they are to bear interest from the date of the failure, payments so adjusted with reference to the actual damage are liquidated damages (2).

The Court will not allow a party who has bound himself by a penalty to do a certain thing to pay the penalty and get rid of his obligation, and if a thing be agreed to be done, though there is a penalty annexed to its non-performance, yet the very thing itself must be done (3).

(1) *Wallis v. Smith*, 21 Ch. D. 243, and see notes, Brett's Leading Cases in Equity, p. 39, *et seq.*

(2) *Lord Elphinstone v. Monkland*

*Iron and Coal Co.*, 11 App. Cas. 332.

(3) Per Lord St. Leonards, *French v. Macale*, 2 Dr. & War. 269.



The law on this subject is very well illustrated by a case which came before the Court of Appeal in 1888 <sup>(1)</sup>. The defendant on entering the service of the plaintiffs who were a banking company, executed a bond in the penal sum of £1000, the condition of which was that it should be void if he should perform his duties in the manner therein mentioned, and also if he should pay to the plaintiffs £1000 as "liquidated damages," in case he should at any time within two years after his leaving the service of the plaintiffs accept any employment in any other bank within twenty miles of the plaintiffs' bank or any branch thereof. The defendant voluntarily resigned his employment in the service of the plaintiffs' bank, and immediately entered the service of a rival bank in the same town. The plaintiffs then brought an action claiming an injunction to restrain the defendant from accepting any engagement in any bank unconnected with the plaintiffs' bank within twenty miles of the principal bank. The defendant was willing, and offered, to pay the penal sum of £1000. The Court, however, decided that the defendant could not satisfy his obligation by paying the penal sum which he offered.

The Court will not excuse performance of covenant on payment of penalty.

One of the judges of the Court of Appeal in delivering judgment said: "These bonds are not easy to construe, but we have to do our best to find out the meaning from the words of the condition and from what must have been the intention of the parties. One thing is clear, that the object of the bond was to prevent a clerk of the bank from entering into the employment of any rival bank, but this object is wrapped up in affirmative and not in negative language . . . ."

"But in my opinion the true meaning of the condition is that which is contended for by the plaintiffs, namely, that if the plaintiffs should bring an action they were not to be embarrassed by having to prove actual damage, but should be entitled to recover £1000 damages. In the case of an ordinary bond it would be no answer to such an action that the defendant was ready to pay the penalty. That is settled."

In a case which came before the Court of Appeal in 1880, the plaintiffs lent money to a man upon his bond, under which the principal was to be paid in five years by instalments, in case the debtor should so long live, the instalments being calculated so as to cover the principal of the loan, interest thereon, the expenses of negotiating it, and a margin representing a premium for the insurance of the debtor's life. The

<sup>(1)</sup> *National Provincial Bank of England v. Marshall*, 40 Ch. D. 112.

condition of the bond made it void on certain stringent conditions, but provided that the whole balance of his instalments should be at once payable on the failure of any single instalment <sup>(1)</sup>. Default was made in payment of one instalment and the whole sum was claimed. The Court of Appeal decided that the amount claimed was not a penalty, and that it therefore could be recovered. In this case the law was summed up as follows :—

Relief  
against  
penalties.

The doctrine in equity is stated by Lord Macclesfield, L.C., in *Peachy v. Duke of Somerset*. “The true ground of relief against penalties, is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired”; but it has been long established that relief in equity is also given where the penalty is intended to secure the performance of a collateral object (*Sloman v. Walter*). Familiar instances of the relief afforded in equity, may be found in those cases where a default has occurred in repayment of a loan secured by a mortgage; but where the intent is not simply to secure a sum of money, or the enjoyment of a collateral object, equity does not relieve.

Forfeiture.

Attention has already (*ante*, p. 125, *et seq.*) been directed in connection with the subject of property to the important provisions of the Conveyancing Act <sup>(2)</sup> with reference to relief against forfeiture of leases. Prior to this enactment the Courts had only the power to relieve in cases of non-payment of rent and breach of covenant to insure. The provisions of Lord St. Leonards' Act (22 & 23 Vict. c. 35) with reference to relief in respect of insurance are now repealed, and relief in respect of breach of covenants of this description is now placed on the same footing as that in respect of other covenants.

In connection with the subject of forfeiture it should be borne in mind that it is expressly provided by the Settled Land Act,

(1) *The Protector Endowment, Loan, and Annuity Co. v. Grice*, 5 Q. B. D. 592.

(2) 44 & 45 Vict. c. 41, s. 14, and see cases thereon collected in note, Clerk and Brett's Conveyancing Acts, 3rd ed. p. 79, *et seq.* In a case where a lease contained a proviso, that in case (*inter alia*) the lessees should during the term be bankrupt, or file a petition in liquidation, the term should cease, the lessees presented a petition, and a receiving order was made, it was contended that sub-sect. 6 only applies to cases

where the estate must pass away entirely from the lessee, and that in the present case if there had been a composition the estate would not pass. The Court, however, decided that the presentation of the petition caused a forfeiture of the term, and that sect. 14 of the Conveyancing Act had no application to the case before it. *Ex parte Gould*, 13 Q. B. D. 451.

See as to clause of forfeiture of property on bankruptcy being void as a violation of the bankruptcy law: *Ex parte Jay*, 14 Ch. D. 19, and cases therein referred to.

1882, that any clause of forfeiture purporting, or attempting, or tending, or intended to prohibit, or prevent a tenant for life from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, so far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void. And the next section provides that notwithstanding anything in a settlement the exercise by the tenant for life of any power under the Act shall not occasion a forfeiture <sup>(1)</sup>.

<sup>(1)</sup> 45 & 46 Vict. c. 38, ss. 51, 52. The question under what circumstances is a vendor entitled to forfeit the deposit which the purchaser has paid, was much discussed in a recent case when the principle was laid down that, in order to enable the vendor to forfeit the deposit, there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract. The pur-

chaser must, in fact, have lost not only his right to specific performance, but also his right to sue for damages: *Howe v. Smith*, 27 Ch. Div. 89; *Soper v. Arnold*, 35 Ch. D. 384, affirmed 14 App. Cas. 429; and see also *Ex parte Barrett*, L. R. 10 Ch. 512; *Thomas v. Brown*, 1 Q. B. D. 714; *Clerke & Humphry's Sales of Land*, p. 109, *et seq.* See also on the subject of liquidated damages: *Lea v. Whitaker*, L. R. 8 C. P. 70, and *Magee v. Lavell*, L. R. 9 C. P. 107; *Re Newman*, 4 Ch. D. 724.

## CHAPTER XVIII.

## THE BUSINESS SPECIALLY ASSIGNED BY STATUTE TO THE CHANCERY DIVISION.

The subject which it is now proposed to consider under the above title is generally spoken of as "The Statutory Jurisdiction of the Chancery Division." This phrase, though compendious, and to a certain extent sanctioned by usage, is nevertheless to some extent misleading. "Whatever jurisdiction the Court of Chancery formerly had," said the late Lord Justice James<sup>(1)</sup>, "has now been transferred to the High Court of Justice. The only question is as to the mode of proceeding, and no one has a vested right in any particular form of proceeding. A man has no vested right to have his cause tried before a judge of the Chancery Division any more than he had a vested right to have it heard by a particular judge of the Court of Chancery, or a vested right to prevent it being transferred from one judge to another." What has been done is to assign particular matters to the Chancery Division, and as was pointed out by Sir George Jessel<sup>(2)</sup>, that which is assigned to the Chancery Division is by no means co-extensive with the old equity jurisdiction but very much less.

Among the matters so assigned, are mentioned all causes and matters to be commenced after the commencement of the Judicature Act, 2nd November, 1875, under any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters has been given to the Court of Chancery. Our present task is to consider the principal statutes by which jurisdiction has been given.

<sup>(1)</sup> *Warner v. Murdock*, 4 Ch. Div. 752.

<sup>(2)</sup> *Rogers v. Jones*, 7 Ch. Div. 349. The lengthy enumeration of more than one hundred statutes "conferring a statutory jurisdiction on the Chancery Division," which is to be found in Daniell's *Chancery Practice*, 6th ed., p. 2037, *et seq.*, becomes considerably less formidable when we bear in mind that a consider-

able number of the statutes so enumerated have no special reference whatever to the Chancery Division. Several of them, though not repealed, are practically obsolete, *e.g.* the Land Registry and Declaration of Title Acts of 1862, 25 & 26 Vict. cc. 53, 67; and the Land Transfer Act of 1875, 38 & 39 Vict. c. 87; while a considerable number of others are of comparatively slight importance.

There is an old statute of 6 Anne, c. 18 (c. 72 in the revised 6 Anne, edition of the statutes), which provides that when lands are held c. 18. *pur autre vie*, i.e., for the life of another (see *ante*, p. 29, *et seq.*), any person entitled in reversion or remainder may, on affidavit proving his title and stating his belief that the *cestui que vie* is dead, and his death concealed, once a year obtain from the Lord Chancellor, &c., an order for the production of the *cestui que vie*. In default, the *cestui que vie* is to be taken to be dead, and the claimant may enter. In one case this order was made for production at the porch of the parish church; in another before commissioners at Brussels; in a third at the Middle Temple Hall; and in one of the most recent cases at the bar of the Court at an appointed time <sup>(1)</sup>.

It has been decided that the Court has power to make an order for the production of a *cestui que vie*, as well upon a person having an interest determinable on a life, as on a person having an estate *pur autre vie* strictly so called <sup>(2)</sup>.

Sect. 33 of the Fines and Recoveries Act (3 & 4 Wm. 4, 3 & 4 Wm. c. 74 (*ante*, p. 35)), appoints the Lord Chancellor in cases of 4, c. 74. lunacy, &c., and the Court of Chancery, in cases of treason felony and some other cases, protector of the settlement.

#### LANDS CLAUSES CONSOLIDATION ACT, 1845 (8 & 9 VICT. c. 18), AND AMENDING ACTS.

Another Act which conferred a special jurisdiction on the Chancery Courts is the Lands Clauses Consolidation Act of 1845 (8 & 9 Vict. c. 18) <sup>(3)</sup>. Prior to the passing of that statute, when railway or other companies or public bodies obtained special Acts of Parliament authorising them to acquire lands for the purposes of their undertakings or works of a public character, it was usual to insert in each private Act such special powers

<sup>(1)</sup> *Re Castledine*, 44 L. T. (N.S.) 469. It was decided in *Mayrick v. James*, 23 Beav. 449, that the Master of the Rolls had no jurisdiction under this Act, and it would seem probable that the jurisdiction has been transferred to the High Court of Justice: Seton on Decrees, p. 1279. In all the cases, however, which have been reported on the subject since the Judicature Act, *Re Owen*, 10 Ch. Div. 166; *Ex parte Castledine*, *ubi sup.*; *Re Thomas Stevens*, 31 Ch. Div. 320; *Ex parte Dashwood and Paget*, W. N. (1888) 139; *In re Pople*, 40 Ch. D.

589, the applications have been made to the Chancery Division.

<sup>(2)</sup> *In re Stevens*, 31 Ch. D. 320; see *In re Pople*, 40 Ch. D. 589.

<sup>(3)</sup> Amended by 23 & 24 Vict. c. 106, and 32 & 33 Vict. c. 18; and see, as to the very numerous cases which have been decided on this subject: Morgan & Wurtzburg's Chancery Acts and Orders, p. 38, *et seq.*; Daniell's Chancery Practice, 6th ed., p. 2137; see also *Docker v. Greaves*, 33 Ch. D. 607, and the very important decision, *Re Mills*, 34 Ch. D. 24.

Lands  
Clauses  
Consoli-  
dation Act.

and provisions as were deemed necessary for the acquisition of the requisite land. The object of the Lands Clauses Consolidation Act, as we are told in its preamble, was twofold: (1) to avoid the necessity of repeating such provisions in each of the several Acts relating to such undertakings; and (2) to introduce greater uniformity into the provisions themselves.

The principal sections of the Lands Clauses Consolidation Act, 1845, so far as our present subject of the jurisdiction of the Chancery Division is concerned, are sects. 1-4, dealing with definitions and preliminary matters; sect. 69, which deals with purchase-money or compensation, where the parties entitled to the land in question have limited interests or are prevented from treating or making title; sects. 69-79, dealing with the application, investment, &c., of the purchase-money or compensation coming to parties having limited interests; and sect. 80, dealing with costs.

Under this Act the Court has power to order payment by the promoters of the undertaking: (1) of all costs of the purchase or taking the land and consequential thereon, except such costs as are otherwise provided for; (2) costs of interim investment; (3) costs of permanent investment and payment out, including not only successive re-investments, but even *bonâ fide* abortive attempts to invest; (4) costs of all proper orders; (5) costs of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants, including costs arising from the land taken being subject to suit or incumbrances, or belonging to persons under disability.

The provisions of the Lands Clauses Consolidation Act are in some cases wholly, in others partially, incorporated in a large number of public statutes of great importance, among which may be noticed the Defence Acts, 1842, 1860, and 1864, under which Her Majesty's Secretary of State for War is enabled to obtain lands for the defence of the realm; the Elementary Education Act, 1870, the Artizans' Dwelling Acts, 1875, 1882, the Electric Lighting Act, 1882, Housing of the Working Classes Act, 1890.

By Order LV. r. 2 (7) of the Rules of the Supreme Court, 1883, amended by Rules of the Supreme Court, December, 1885, all applications for interim and permanent investment, and for payment of dividends under the Lands Clauses Consolidation Act, 1845, "and any other Act" whereby the purchase-money of any property sold is directed to be paid into Court, are to be made by summons in chambers.

## THE TRUSTEE RELIEF ACTS, 1847 AND 1849.

These Acts (10 & 11 Vict. c. 96, amended by 12 & 13 Vict. c. 74) enable trustees, executors, administrators, or other persons, who have in their hands any moneys "belonging to any trust whatsoever," or the major part of them, on filing an affidavit shortly describing the trust according to the best of their knowledge and belief, to pay money or transfer stock into Court with the privity of the Paymaster-General, substituted for the Accountant-General by 35 & 36 Vict. c. 44 (the Court of Chancery Fund Act, 1872). Formerly the Court dealt with the fund thus paid in on petition, but now (by Order LV. r. 2, sub-r. 5, Rules of Supreme Court, 1883), all applications under the Trustee Relief Acts, where the money or securities in Court do not exceed £1000 or £1000 nominal value, are to be made by summons at chambers. Even where the funds exceed £1000 in cases where the title only depends on proof that the party entitled has attained twenty-one years of age, it has been decided that the application ought to be by summons <sup>(1)</sup>. Order xxxviii. r. 1, of the County Court Rules, 1886, provides that applications in the County Courts under the Trustee Relief Acts are to be by petition.

Sub-sect. 6 of the 25th sect. of the Judicature Act, 1873, which deals with the assignment of debts and choses in action, concludes with a proviso that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees <sup>(2)</sup>.

Judicature  
Act, 1873,  
sect. 25,  
sub-sect. 6.

<sup>(1)</sup> *Re Broadwood*, 55 L. J. (Ch.) 646. It would seem that in any case of real difficulty the costs of a petition will be allowed, even if the application might have been made by summons. But the mere fact that the fund exceeds £1000 is not sufficient to justify the presentation of a petition: *Bates v. Moore*, 38 Ch. D. 382; commenting on *Re Rhodes*, 31 Ch. D. 499.

<sup>(2)</sup> See as to payment into Court by banking and insurance companies: *Re Haycock's Policy*, 1 Ch. Div. 611; *Matthews v. Northern Assurance Co.*, 9 Ch. D. 80; *Re Sutton's Trusts*, 12 Ch. Div. 175. It would seem that under the provisions of the Judicature Act, cited above, in cases of absolute assignments insurance companies have now the option of paying the money into Court in conformity

Where infants are interested, recourse may be had to the Legacy Duty Act (36 Geo. 3, c. 52); and Order LV. r. 2 (4), Rules of the Supreme Court, 1883, provides that in cases under this Act, where the money or securities in Court do not exceed £1000 or £1000 nominal value, the application ought to be made by summons. The late Master of the Rolls, speaking in the year 1878, laid it down that as a general rule, in doubtful cases, trustees ought to take the opinion of the Court on summons, and now under the present practice, it is comparatively seldom expedient to pay money into Court under the Trustee Relief Acts, as Order LV. r. 3 (*d*) and (*g*), expressly enables questions with regard to the payment of money into Court by executors, administrators, and trustees, and the determination of any question arising in the administration of an estate or trust, to be dealt with on "originating summons" (*post*, p. 779). The practice as to lodgments under the Trustee Relief Acts is now regulated by Supreme Court Fund Rules, 1886, r. 41.

In a case where a question arose as to who were entitled as next of kin to shares of residue, and the trustees paid such shares into Court under the Trustee Relief Acts, the Court considered that the proper course would have been to take out an originating summons under Order LV., and thus obtain the requisite inquiry. "A case" (<sup>1</sup>), said the judge, "may be imagined where the residue is divisible into twelve shares, and one of the shares lapses. Are the persons entitled to the other eleven shares to wait until a very difficult inquiry as to the next of kin entitled to the twelfth share is worked out? But then, I think, the answer to that is simple. They need not wait. It is easy enough for the trustees to ascertain approximately the amount of the shares, and to set apart a fund to answer and pay the costs of ascertaining the next of kin, or if any difficulty should arise, then the trustees can come to the Court at once and ask the Court to ascertain the fund for them, or tell them what they ought to pay over, or if they ought to pay over anything, and thus act by the direction and under the sanction of the Court. It is quite easy to do that by means of an originating summons under Order LV."

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with the provisions of the Trustee Relief Act, even though there be no trust, and with precisely the same risk as to costs as if they were in-

dividual trustees: Brett's Leading Cases in Equity, p. 265.

(<sup>1</sup>) *Re Giles*, 34 W. R. 712.



## THE TRUSTEE ACTS, 1850 AND 1852.

These Acts (13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55), which were formerly of very great, and still are of considerable importance, enable the Chancery Division to appoint new trustees and to make vesting orders as to lands, stocks, and *choses in action*.

The whole scope of the Acts, as was stated in a leading case on the subject <sup>(1)</sup>, is to embrace every case of inconvenience that can possibly arise and calls for a remedy. They provide for cases: (1) where trustees or mortgagees or their respective representatives are lunatics or of unsound mind; (2) where trustees or mortgagees are infants; (3) where sole trustees, &c., are out of the jurisdiction of the Court or cannot be found; (4) where two trustees die and it is uncertain which of them was the survivor; and several other cases, including even provision for the contingent rights of unborn persons who might become trustees. There is also a sweeping provision (contained in sect. 32 of the Act of 1850 and sect. 9 of the Act of 1852) enabling the Court to appoint trustees either in addition to or in substitution for other trustees, or even if there be no trustee at all, whenever it shall be expedient so to do, and whenever it shall be found "inexpedient, difficult or impracticable" so to do without the assistance of the Court <sup>(2)</sup>.

Applications under these Acts are still occasionally made, but they are comparatively unfrequent, very great innovations having been introduced into the law upon this subject by the Conveyancing Act of 1881 (see *ante*, p. 535). The power which is conferred by that Act arises in the following six events, viz., in case the trustee, whether original or substituted, (1) is dead; or (2) remains out of the United Kingdom for more than twelve months; or (3) desires to be discharged from the trusts; or (4) refuses to act; or (5) is unfit to act; or (6) is incapable of acting in the trusts. And an early decision upon the Act laid down the rule that whenever the power given by the Conveyancing Act can be exercised, a petition ought not to be presented <sup>(3)</sup>.

## LORD ST. LEONARDS ACT (22 &amp; 23 VICT. c. 35).

This Act (s. 30) enabled trustees, executors, or administrators to obtain the opinion of the High Court of Chancery (now the

<sup>(1)</sup> *Bristow v. Booth*, L. R. 5 C. P. 80, 91.

<sup>(2)</sup> *Re Tweedy*, 28 Ch. Div. 529.

<sup>(3)</sup> *Re Gibbon*, 30 W. R. 287.

Chancery Division) with regard to the management, &c., of trust property without the institution of a suit, by petition or by summons upon a written statement of facts. A subsequent Act (23 & 24 Vict. c. 38, s. 9) enacted that the petition or statement of fact must be signed by counsel <sup>(1)</sup>.

The opinion of the Court thus given is not subject to appeal. The Act was not intended to decide nice questions of law, its object being to procure for trustees at a small expense the assistance of the Court upon points of minor importance arising in the management of the trust.

The Court will give advice as to investments or payment of debts, or propriety of trustees consenting to a sale, or advancing money for maintenance or repairs or leasing, but will not advise on questions of detail or difficulty or points of construction, nor will it pronounce an opinion on an hypothetical case <sup>(2)</sup>.

Procedure under this Act has been to a great extent superseded by that under Order LV. (*post*, p. 785, *et seq.*).

An Act passed in 1862, by Lord St. Leonards (25 & 26 Vict. c. 108), enables trustees and other persons authorized to dispose of land by way of sale, exchange, partition, or enfranchisement (unless expressly forbidden by the instrument creating the trust), with the sanction of the Court of Chancery, to sell land apart from minerals, or minerals apart from land <sup>(3)</sup>.

The Judgment Act, 1864 (27 & 28 Vict. c. 112), enables creditors to whom lands have been actually delivered in execution under a judgment to obtain from the Court, upon petition in a summary way, an order for sale of the debtor's interest in the land. (See *post*, p. 775, where the authorities are collected.)

#### THE VENDOR AND PURCHASER ACT, 1874 (37 & 38 VICT. c. 57).

Sect. 9 of this Act conferred an important jurisdiction upon the Court of Chancery, which now belongs to the Chancery Division. Its 9th section enables a vendor or purchaser of real

<sup>(1)</sup> The practice as to the form and title of the petition, and the procedure generally, is regulated by Rules of the Supreme Court 1883, Order LII. rr. 19, 22. It was decided in *In re Knowles* (18 L. T. Rep. (N.S.) 809), that the costs are payable out of the corpus of the trust fund, but this rule has been departed from when the question before the Court only concerned income. Order LXV. r. 26, deals with the subject of costs under this section, and provides that

the fees and allowances to solicitors on proceedings under it, are to be the same as those payable under the rules and practice for business of a similar nature. It was decided in the recent case of *In re Bolton* (30 W. R. 596), that the signature of counsel, notwithstanding Order XIX. r. 4, is still necessary.

<sup>(2)</sup> See Morgan and Wurtzburg's Ch. Acts and Orders, note to Act.

<sup>(3)</sup> Passed in consequence of *Buckley v. Howell*, 29 Beav. 546.

or leasehold estate, or their representatives, to apply in a summary way to a judge of the Chancery Court in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, *not being a question affecting the existence or validity of the contract*, and gives the judge power to make such order on the application as to him shall appear just, and to direct how and by whom all or any of the costs of and incident to the application are to be borne. The cases on this important section have been already considered in the Chapter on Specific Performance <sup>(1)</sup>.

#### THE CONVEYANCING ACT, 1881.

Sect. 69, sub-sect. 1, of this important statute, enacts that all matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division: and by sub-sect. 3 of the same section all applications, except when otherwise expressed, are to be by summons at chambers.

Sect. 5 enables "the Court" <sup>(2)</sup>, when land is subject to incumbrance, on the application of any party to the sale, to direct or allow payment into Court of such an amount as will be sufficient to provide for the charge, with an addition not exceeding one-tenth to provide for contingencies, except under special circumstances. The Court may then declare the land free from incumbrance, and, after notice to the parties interested, give directions as to the application and distribution of the capital or income.

Sect. 9 (sub-sects. 7 and 10) <sup>(3)</sup>, which deals with acknowledgments and undertakings for the production and safe custody of title deeds now substituted for the old form of covenant to produce (see *ante*, p. 91), enables the Court to make orders for production of documents and delivery of extracts, and to assess damages for loss.

Sect. 14, sub-sect. 2, confers upon the Court a very important power of relieving in cases of re-entry and forfeiture for breach of covenants in leases (see *ante*, p. 125 <sup>(4)</sup>).

<sup>(1)</sup> See *ante*, p. 585, *et seq.*, for the cases decided on this section.

<sup>(2)</sup> It was held, in the case of *Re Great Northern Railway Company v. Sanderson and others*, 25 Ch. Div. 788, that the Court would not compel a vendor to discharge an incumbrance

when so doing would entail great hardship upon him.

<sup>(3)</sup> See *Dickin v. Dickin*, 30 W. R. 887; *Patching v. Bull*, 30 W. R. 244.

<sup>(4)</sup> *North London Land Co. v. Jacques*, 32 W. R. 283.

Sect. 24 enables the Court to allow a receiver a higher rate of remuneration than the 5 per cent. specified for ordinary cases.

Sect. 25, sub-sect. 2, greatly enlarges the power of the Court as to ordering sales of mortgaged property, while sub-sect. 3 enables it to direct security for costs, to give the conduct of the sale to any defendant, and to give such directions as it thinks fit on the subject of costs.

Sect. 39 enables the Court to bind the interest of a married woman restrained from anticipation, with her consent, when it appears to be for her benefit <sup>(1)</sup>.

Sect. 42 empowers the Court to appoint trustees for the management of infants' property.

Sect. 70 renders orders of the Court conclusive against purchasers, and this was interpreted to apply to an order of the Court, even when it appeared on its face to be irregular <sup>(2)</sup>.

#### THE SETTLED LAND ACT, 1882 (45 & 46 VICT. c. 38).

The Chancery Division has also a further important class of business frequently involving large interests specially assigned to it under the Settled Land Act of 1882, which, to a large extent, supersedes the Settled Estates Act of 1877, and its amending Acts (45 & 46 Vict. c. 38; 47 & 48 Vict. c. 18; 50 & 51 Vict. c. 30; 53 & 54 Vict. c. 69).

The 46th section, sub-sect. 1 of the Settled Land Act, 1882 (see *ante*, p. 145, as to this important statute), provides that all matters within the jurisdiction of the Court under the Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division. Sub-sect. 3 of the same section declares that every application to the Court shall be by petition or by summons at Chambers, but now the rules under the Settled Land Act, 1882 (rule 2), provide that all applications to the Court, under the Act, may be made by summons in Chambers, and if in any case a petition shall be presented without the direction of the Judge, no further costs shall be allowed than would be allowed upon a summons <sup>(3)</sup>. Business under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18 (now almost wholly superseded by the Settled Land Act, 1882)) is also assigned (by sect. 3) to the Chancery Division.

<sup>(1)</sup> See as to practice, viz., by originating summons: *Re Lillwall's Settlement*, 30 W. R. 243, and see the numerous cases on this section collected and classified, note to Clerke and Brett's Conveyancing Act, 3rd

ed. p. 161.

<sup>(2)</sup> *Re Hall-Dare's Contract*, 21 Ch. D. 41.

<sup>(3)</sup> See, however, *Re Bethlehem and Bridewell Hospitals*, 30 Ch. D. 541.

## THE MARRIED WOMEN'S PROPERTY ACT, 1882.

The provisions of this extremely important statute have been considered elsewhere (*ante*, p. 210). On the present occasion, however, we have only to deal with it so far as it peculiarly affects the question of the assignment of business to the Chancery Division, and our present task is therefore comparatively light. The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), specifically assigned to the Court of Chancery the business of deciding all questions as to property declared by the Act to be the separate property of the wife and the appointment of trustees of policies of assurance. That Act has been repealed (subject to a saving clause) by sect. 22 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and the effect of this repeal is to take from the Chancery Division a department of business which would otherwise have devolved upon it under sect. 34 of the Judicature Act, 1873 (*ante*, p. 354). Sect. 17 of the Act of 1882 expressly enables any judge of the High Court of Justice to determine all questions between husband and wife as to the title or possession of property<sup>(1)</sup>. Except indeed so far as the provision in sect. 11 that trustees of policy moneys may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending or extending the same (see *ante*, p. 695), may be taken to give the Chancery Division something in the nature of a peculiar jurisdiction, anything in the nature of a special assignment of business to any division of the High Court is conspicuous by its absence in the Married Women's Property Act, 1882.

THE GUARDIANSHIP OF INFANTS ACT, 1886<sup>(2)</sup>.

The 9th section of this important statute (see *ante*, p. 609) provides that any application under the Act to the High Court of Justice in England or Ireland, shall be made to the Chancery Division of the said Court respectively. The business under the Infants' Custody Act, 1873<sup>(3)</sup> (*ante*, p. 609), is also assigned to the Court of Chancery, now the Chancery Division<sup>(4)</sup>.

(1) See *Wood v. Wood*, 14 P. D. 157, where the application was in a pending divorce suit.

(2) 49 & 50 Vict. c. 27.

(3) 36 & 37 Vict. c. 12.

(4) The Court of Chancery had also a special assignment of busi-

ness under the following statutes: The Copyholds Act, 1841, &c.; Land Tax Redemption Act (42 Geo. 3, c. 116); Parliamentary Deposits, 1846 (9 Vict. c. 20); the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, ss. 62-65); Railway Companies

It has, however, been decided, as already pointed out (*ante*, p. 604), that the Queen's Bench Division has a concurrent jurisdiction in matters relating to infants <sup>(1)</sup>.

Act, 1867 (30 & 31 Vict. c. 127); Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78); and the Mortgage Debenture (Amendment) Act, 1870 (33 & 34 Vict. c. 20); Metropolitan Board of Works Loans, 1869 (32 & 33 Vict. c. 102, s. 4); Tramways Act, 1870; National Debt, 1870 (33 & 34 Vict. c. 76, s. 58-60); Business under the Open Spaces Act, 1890 (53 & 54 Vict. c. 15) is assigned to the Chancery Division. The business which may be transferred to the High Court under the Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23) does not include causes or matters which, if commenced in the High Court, would have been assigned to the Chancery Division.

By Order LV. r. 26 of the Rules of the Supreme Court, 1883, all applica-

tions under the Parliamentary Deposit Act, and any other relating to Parliamentary deposits, are to be made by summons at chambers. Order LV., r. 211, contains a similar provision with regard to applications under the Copyholds Act in respect of securities or money in Court.

See as to the mode in which a petition or an originating summons should be entitled when issued under the authority of an Act of Parliament giving summary jurisdiction or rules of Court: Table adopted by the Practice Masters; Annual Practice, 1889-90, p. 1207.

<sup>(1)</sup> *Re Goldsworthy*, 2 Q. B. D. 75. See as to writ of *habeas corpus*, *The Queen v. Barnardo*, 23 Q. B. D. 305; *Reg. v. Barnardo*. *Gossage's Case*, 24 Q. B. D. 283.

## BOOK VI.

### PRACTICE.

#### CHAPTER I.

##### INTRODUCTORY—COMMENCEMENT OF ACTION.

What is Practice? This question may be well answered in the language employed by Lord Penzance in a judgment delivered in 1886 <sup>(1)</sup>, “Everything which constitutes a part of what I may call the machinery of justice in its administration is a matter of practice. The forms in which the parties shall present their respective cases; the times fixed and allowed for the successive steps in a suit; the times and places, whether in Court or chambers, at which applications to the judge should be made and heard; the forms to be followed; and the rules to be observed in the entire progress of the suit; these things do not concern the law or justice involved in the suit on either side, but only the mechanical arrangements under which the opposite contentions of the suitors may be best presented to the judgment of the Court, and are consequently matters of procedure or practice.”

What is  
Practice?

The attention of the reader has already been drawn to the fact that before the 2nd November, 1875, a plaintiff who sought to enforce a claim against another was obliged to employ different forms of procedure in different Courts, and that the Judicature Acts and Rules which then came into operation to a very large extent introduced uniformity in this respect into the practice of the different divisions of the Court (*ante*, p. 346).

Commence-  
ment of  
action.

The very first of the Rules provides that all actions which, previously to the commencement of the Judicature Act, were commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which, previously to the commencement of the Judicature Act, were commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall

(1) *Noble v. Ahier*, 11 P. D. 158.

be instituted in the High Court of Justice by a proceeding to be called an action.

General  
provision  
as to  
practice.

This is followed by a general provision of great importance, that all other proceedings in and applications to the High Court may, subject to the rules of Court, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if the Judicature Acts had not been passed <sup>(1)</sup>.

Where no rule of practice is laid down by the Orders under the Judicature Acts, and there is a variance between the former practice of the Courts of Chancery and Common Law, that practice which is considered by the Court to be the better and more convenient, is to prevail.

Illustra-  
tion.

This rule may be illustrated by the decision of the Court in the two important cases <sup>(2)</sup> in which the principle was first laid down, which are peculiarly appropriate for our consideration, as they concern the very commencement of an action.

In these cases solicitors had employed the names of persons as plaintiffs without their authority. The practice with regard to such cases in the Common Law Courts was completely different from that which was established in the Court of Chancery. The late Sir George Jessel, in delivering judgment, said :—

“In such cases the old practice of the Court of Chancery was that the defendant was not served with notice of the application, but was left to get his costs from the person named as plaintiff, who had afterwards to get these costs over from the solicitor. The result was, that the nominal plaintiff, who had never given any authority for the use of his name, had to pay the defendant's costs, and might be unable to recover them by reason of the insolvency of the solicitor. On the other hand, according to the practice of the Common Law Courts, the defendant was served with notice of the application, and the solicitor had to pay the costs of both the plaintiff and the defendant. <sup>(3)</sup>

“The question is, which practice is now to be followed. Since the passing of the Judicature Act that must be left to the Court to determine. By the 21st section of the Judicature Act, 1875, it is enacted that in cases where no new method of procedure is

(1) See as to motions, O. LII.; petitions, O. LII. r. 16; summonses, O. LV. r. 20; originating summons, O. LV. r. 3; special case, O. XXXIV.

(2) *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 13 Ch. D. 310; *Nurse*

*v. Durnford*, 13 Ch. D. 764; and see Brett's *Leading Cases in Modern Equity*, p. 309, where the cases on the subject are reviewed.

(3) *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 13 Ch. D. p. 310.



prescribed the old practice is to prevail, but where there is a variance in the practice it does not say which practice. I have no hesitation in saying that I think the common law practice in this case is founded in natural justice, and ought to be followed in the future."

The decision of the Court, accordingly, in both cases, was that the actions must be stayed, and that the solicitors who had commenced them without authority must pay the costs of the plaintiffs as between solicitor and client, and the costs of the defendants as between party and party (see *post*, p. 801).

Every action in the High Court is commenced by a writ of summons, which must be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which must specify the Division of the High Court to which it is intended that the action should be assigned. There is an old established principle with regard to judicial acts that the law takes no account of any fraction of a day, and that such acts "relate back to the earliest moment of the day on which they are done." It has, however, been decided that to issue a writ of summons is not a "judicial act," and that the Court may therefore enquire at what period of the day a writ was issued <sup>(1)</sup>.

Commencement of action.

No writ of summons for service out of the jurisdiction or of which notice is to be given out of the jurisdiction, may be issued without the leave of the Court or a judge <sup>(2)</sup>.

Service out of jurisdiction.

It may be convenient here to notice that the expression "the Court or a judge" means throughout the rules a judge in Court or a judge in Chambers. The jurisdiction of a judge in Chambers is, with certain important exceptions hereafter noticed (*post*, p. 779, *et seq.*), expressly made exercisable by a master in the Queen's Bench Division, and a chief clerk in the Chancery Division <sup>(3)</sup>.

The Court or a judge.

Generally speaking, every writ must be dated on the day on which it is issued, and be tested in the name of the Lord Chancellor, or, if that office be vacant, in the name of the Lord Chief Justice of England <sup>(4)</sup>.

<sup>(1)</sup> *Clarke v. Bradlaugh*, 8 Q. B. D. 63.

<sup>(2)</sup> R. S. C., Order II. r. 4; 19 Ch. D. 460, 461.

<sup>(3)</sup> The words "court or a judge," said Jessel, M.R., were used in the rules, because the rules applied to all the divisions, and in the common law divisions it was not always possible to get a judge in Cham-

bers: *Freason v. Loe*, 26 W. R. 138; and see *Baker v. Oakes*, 2 Q. B. D. 171; *Clover v. Adams*, 6 Q. B. D. 622; and note in Annual Practice, 1890-1891, 187.

<sup>(4)</sup> R. S. C., Order II. r. 8. A mistake in the *teste* is a mere imperfection and not fatal: *Wesson Brothers v. Stalker*, 47 L. T. 444.

The indorsement of claim in which, however, it is not essential to set forth the precise ground of complaint or precise relief sought, must be made on every writ of summons before it is issued <sup>(1)</sup>.

Indorse-  
ment on  
writ.

The other indorsements which must or may be made on a writ are as follows :—

If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, *e.g.*, as a trustee or executor, the indorsement must shew in what capacity the plaintiff or defendant sues or is sued <sup>(2)</sup>.

In Probate actions the indorsement must shew whether the plaintiff claims as creditor, executor, administrator, residuary legatee, legatee, next of kin, heir-at-law, devisee, or in any and what other character <sup>(3)</sup>.

If the action is for a debt or liquidated demand in money arising upon a simple contract or on a specialty, or on a statute where the sum sought to be recovered is a fixed sum and not a penalty, or on a guaranty when the claim against the principal is in respect of a liquidated demand only, or on a trust, or for the recovery of land by landlord against tenant, there may be a *special indorsement* stating the remedy or relief claimed. If the action is for a debt or liquidated demand *only*, the indorsement *must* state the amount on payment of which the action will be stayed. If the plaintiff desires an account in the first instance he must ask for it by the indorsement on his writ <sup>(4)</sup>. See further as to the specially indorsed writ, *post*, p. 724, *et seq.*

The name and address of the plaintiff <sup>(5)</sup> and his solicitor (if he brings his action by a solicitor) must be indorsed on the writ or other document by which the proceedings are commenced, and also an address for service within three miles of the Royal Courts of Justice in the Strand. If the solicitor is only an agent, the name and address of the principal solicitor must also be given.

It may here be noticed that in order to facilitate the prosecu-

<sup>(1)</sup> R. S. C., Order III. r. 1. When-  
ever a statement of claim is delivered  
the plaintiff may by it "alter, modify,  
or extend" his claim without amend-  
ing the indorsement on his writ:  
R. S. C., Order XX. r. 4. When, how-  
ever, the defendant does not appear,  
and a statement of claim is only  
delivered by filing (*post*, p. 723), the  
plaintiff cannot obtain judgment in  
default of appearance for more than he  
has claimed by his writ: see *Gee v.*  
*Bell*, 35 Ch. D. 160; *Kingdon v.*

*Kirk*, 37 Ch. D. 141.

<sup>(2)</sup> R. S. C., Order III. r. 4.

<sup>(3)</sup> R. S. C., Order III. r. 5.

<sup>(4)</sup> R. S. C., Order III. rr. 6, 7, 8.  
The specially indorsed writ is itself  
a statement of claim, and therefore in  
this case no further statement of  
claim can be delivered: R. S. C.,  
Order XX. r. 1 (a); see *Veale v. Auto-*  
*matic, &c., Co.*, 18 Q. B. D. 631.

<sup>(5)</sup> The plaintiff's place of residence  
must be given: *Story v. Rees*, 24  
Q. B. D. 748.

tion in the country districts of such proceedings as might be more speedily, cheaply, and conveniently carried on therein, provision was made under the 60th section of the Judicature Act <sup>(1)</sup> for the establishment of district registries, and the conduct there of all proceedings in an action in the High Court other than the trial.

District  
registries.

In certain cases it is essential to give notice before commencing action. The principal cases where notice is necessary are in actions against justices of the peace for things done by them in the execution of their duty, and in actions against officers of the army, navy, marines, customs, or excise, for what they have done in their offices. The notice must be given one calendar month before the commencement of the action <sup>(2)</sup>.

(<sup>1</sup>) Judicature Act, 1873, s. 60; Judicature Act, 1875, s. 13; Judicature Act, 1881, s. 22; R. S. C., 1883, Order xxxv.; the Orders of Council, 12th Aug. 1875; 11th Aug. 1884 (W. N. 1884, p. 425); and as to the address for service in these cases, see R. S. C., 1883, Order iv. i. 3; and as to the statement with regard to entry of appearance, which must be on the face of the writ, Order v. rr. 3 and 4. An action if affecting

land ought to be registered as a *lis pendens*: *Price v. Price*, 35 Ch. D. 297.

(<sup>2</sup>) See notes to R. S. C., Order i. r. 1; Annual Practice; *Lea v. Facey*, 17 Q. B. D. 139; *Edwards v. The Vestry of St. Mary, Islington*, 22 Q. B. D. 338. In such cases the question whether notice is necessary is a question to be decided by the judge.

## CHAPTER II.

## PARTIES.

Former  
rule as to  
parties.

Great changes have been introduced into practice with regard to parties to an action, The general rule under the former practice was, that all persons interested in the subject matter of the litigation with regard to the object of the action, must be before the Court either as plaintiffs or defendants.

Present  
rule as to  
parties.

The present practice as settled by the Judicature Act and Rules is as follows <sup>(1)</sup> :—

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. The defendant, though unsuccessful, will, however, be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a judge in disposing of the costs shall otherwise direct <sup>(2)</sup>.

Conversely, with regard to defendants, the rules provide that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given against such one or more of the defendants, as may be found to be liable, according to their respective liabilities, without any amendment. Mis-joinder or non-joinder of parties is not to defeat actions, and in order to avoid miscarriage of justice by reason of any mistake as to parties, very extensive powers are conferred upon the Court of adding or striking out parties, so as to enable it to adjudicate upon all the questions involved in the proceedings <sup>(3)</sup>.

Under the former practice, as pointed out by Lord Justice Lindley <sup>(4)</sup>, a suit by or against partners would have been defective, unless all the partners were before the Court, but under the present practice creditors of a firm have the great practical

<sup>(1)</sup> R. S. C., 1883, Order xvi.

<sup>(2)</sup> R. S. C., 1883, Order xvi. r. 1 :  
*Gort v. Rowney*, 17 Q. B. D. 633.

<sup>(3)</sup> R. S. C., 1883, Order xvi. r. 4.

<sup>(4)</sup> Lindley on 'Partnership, 5th ed., p. 264.

convenience of being able to pursue their claims even to judgment, without first ascertaining who all the partners are.

In the case of actions by and against partners, special provisions as to the practice have been made by the Judicature Rules. The effect of the rules which have introduced these important changes into the practice with regard to actions by and against partners, may be summarized as follows:—

Actions by  
and against  
partners.

I. Partners may sue or be sued in the names of the respective firms in which they were co-partners at the time of the accruing of the cause of action (O. XVI. r. 14). Where an individual trades as a firm, the action may be in the name of the individual “trading as A. & Co.”

II. When the partnership has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ must be served upon every person sought to be made liable (O. XVI. r. 14) <sup>(1)</sup>.

III. Service of the writ may be effected upon any one or more of the partners, or at the principal place of business of the partnership within the jurisdiction, upon any person having at the time of the service the control or management of the partnership business there (O. IX. rr. 6, 7).

IV. When persons are sued as partners in the name of their firm, appearance must be entered by the partners individually, but all subsequent proceedings continue in the name of the firm (O. XII. rr. 15, 16).

V. When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any *defendant*, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the action is brought. Compliance with this demand may be enforced by an order staying the action on such terms as the Court may direct. The action is then to proceed in the name of the firm, but as if the partners had been named in the writ (O. VII. r. 2). A further power is also given to *any* party to an action to apply by summons to a judge for a statement of the names (and note that addresses are not mentioned) of the persons who were at the time of the accruing of the cause of action co-partners in any such firm,

<sup>(1)</sup> This practice was probably introduced on account of the decision of the Court of Appeal in *In re Young*, 19 Ch. Div. 124; Lindley on Partnership, 5th ed., p. 266; see as to service of writ on partners, *Pollexfen v. Gibson*, 16 Q. B. D. 792; *Baillie*

*v. Goodwin*, 33 Ch. D. 604; *Russell v. Cambefort*, 23 Q. B. D. 526, overruling *O’Neile v. Clason*, 46 L. J. (Q.B.) 191. There is no power to allow the entry of a conditional appearance, *Davies v. André*, 24 Q. B. D. 598.

to be furnished in such manner and verified on oath or otherwise, as the judge may direct (O. xvi. r. 14) (see as to the general law relating to partners, *ante*, p. 613; and as to the subject of execution against partners or their property, *post*, p. 772).

Specific  
provision  
as to  
parties.

There are also certain other cases besides those of partners where the Judicature Rules make special provision with reference to the subject of parties. The cases thus specially dealt with are: (1) Cases where the persons interested in the action are numerous; (2) Cases where the parties, or some of them, are under disability, *e.g.* are infants, married women, or persons of unsound mind.

Taking first the cases where the number of persons interested is considerable, the rules provide that persons in a fiduciary position, *i.e.* trustees, executors, and administrators, may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and are to be considered as representing such persons. The Court, however, may, at any stage of the proceedings, order any of such persons to be made parties "either in addition to or in lieu of the previously existing parties" <sup>(1)</sup>.

The next rule proceeding on a similar principle provides that where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.

Again, it is provided that in any case in which the right of an heir-at-law, or the next of kin, or a class, shall depend upon the construction which the Court may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such heir-at-law, or next of kin or class, and the Court shall consider that it will be convenient to have the questions of construction determined before such heir-at-law, next of kin, or class shall have been ascertained, the Court may appoint some one or more persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court in the presence of such persons will be binding upon the heir-at-law, next of kin, or class so represented.

Under this power, in a case where a testator had left his

<sup>(1)</sup> R. S. C., Order xvi. rr. 8 and 9. See *Tucker v. Bennett*, 38 Ch. D. 15; In *Gas Light Co. v. Touse*, 35 Ch. D. 528, the Court ordered beneficiaries

to be added as defendants; and see *Mills v. Jennings*, 13 Ch. D. 639; *Francis v. Harrison*, 43 Ch. D. 183.

personal estate after his wife's decease to be divided amongst his heirs and their children with another person "to be share and share alike," and a question arose as to what classes of his representatives were entitled, the Court appointed persons to represent the various classes of representatives before the questions of construction came on to be decided <sup>(1)</sup>.

With respect to actions for administration of estates and trusts and the prevention of waste, the rules provide as follows:— <sup>(2)</sup>

Action for administration of trust and prevention of waste.

Any residuary legatee or next of kin entitled to a judgment or order for the administration of the personal estate of a deceased person, may have the same without serving the remaining residuary legatees or next of kin :

Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate, directed to be sold, and who may be entitled to a judgment or order for the administration of the estate of a deceased person, may have the same without serving any other legatee or person interested in the proceeds of the estate :

Any residuary devisee or heir entitled to the like judgment or order, may have the same without serving any co-residuary devisee or co-heir :

Any one of several *cestuis que trust* under any deed or instrument entitled to a judgment or order for the execution of the trusts of the deed or instrument may have the same without serving any other *cestuis que trust* :

In all cases of actions for the prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest :

Any executor, administrator, or trustee entitled thereto may have a judgment or order against any one legatee, next of kin, or *cestui que trust* for the administration of the estate or the execution of the trusts.

The Court may also require any person to be made a party to any action or proceeding, and may give the conduct to such person as it may think fit, and may also make such order as may be just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Infants sue as plaintiffs by their next friends, in the manner Infants.

<sup>(1)</sup> *Re Peppitt's Estate*, 4 Ch. D. 230, where the form of order is given. *Re Pringle*, 17 Ch. D. 821.

<sup>(2)</sup> R. S. C., Order xvi. r. 32, *et seq.*, and see *May v. Newton*, 34 Ch. D. 347.

Infants.

formerly practised in the Court of Chancery, and, in like manner, defend by their guardians appointed for that purpose (*ante*, p. 604).

An infant cannot enter an appearance except by his guardian *ad litem*; a special order was formerly necessary for the appointment of such a guardian, but this is no longer required; all that is requisite is an affidavit by the solicitor for the infant to the effect that the person proposed is fit and proper, that he has no interest adverse to the infant, and that he consents to act <sup>(1)</sup>.

Before the name of any person can be used in any action as next friend of any infant, such person must sign a written authority to the solicitor for that purpose, and the authority must be duly filed.

Married women sue and are sued as provided by the Married Women's Property Act, 1882.

Female  
plaintiffs  
and infants.  
Lunatics,  
&c.

A female plaintiff must be described as "spinster," "married woman," or "widow," and if an infant, as an infant.

Where lunatics and persons of unsound mind, not so found by inquisition, might respectively before the passing of the Judicature Acts have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend according to the practice of the Chancery Division, and may in like manner defend any action by their committees or guardians appointed for that purpose.

In a case decided in 1888, where the previous cases on the subject were carefully considered, the Court of Appeal held that a person of unsound mind not so found might sue by a next friend for sale or partition under the Partition Act <sup>(2)</sup>, and Lord Justice Bowen, in discussing the question what is the true ground on which a next friend is allowed to ask for the intervention of the Court on behalf of a person of unsound mind not so found by inquisition, expressed himself as follows:—

"It seems to me to be this, as was said in substance in *Beall v. Smith* (L. R. 9 Ch. 85), and *Jones v. Lloyd* (L. R. 18 Eq. 265), that when there is a person of unsound mind, who although not found to be of unsound mind by inquisition, nevertheless stands in need of the protection or the intervention of the Court, as regards his property real or personal, or as regards any portion

<sup>(1)</sup> It has been decided that a guardian *ad litem* is not a party to the action so as to be compelled to

answer interrogatories: *Ingham v. Little*, 11 Q. B. D. 251.

<sup>(2)</sup> *Porter v. Porter*, 37 Ch. D. 420.



of his property—then, supposing he would, if sane, be entitled to the intervention of the Court, a third person, a stranger, may come forward and do that which is clearly for the benefit of the person of weak mind . . . . Now what sort of limit ought to be put on this rule? It is obvious that, in the absence of the principal person who is concerned, his property ought to be left as far as possible, and so far as his interest does not render the opposite thing necessary to be done, in the condition in which it was *quieta non movere*. But still if it is for his protection and for his obvious benefit, then the Court ought to interfere to give him, while his senses are sleeping, the same sort of protection to which he would be entitled if his senses were awake, and he could act for himself."

Special provision is also made by the rules with regard to proceedings by or against paupers. Before a person can be admitted to sue or defend as a pauper, proof must be given that he is not worth £25 (now substituted for the former limit of £5), his wearing apparel and the subject-matter of the cause or matter only excepted. Before a person can be admitted to sue as pauper, counsel's opinion must be obtained that he has a reasonable ground for proceeding, and the case so laid before counsel, with his opinion, and an affidavit of the party or his solicitor that the case is fully and truly stated, must be produced to the Court or its officer. There is, however, no similar restriction with regard to the right of defending as a pauper. The person admitted to sue or defend is exempted from Court fees. Counsel and solicitor may be assigned to him, and no fees can be taken from him <sup>(1)</sup>.

Actions by  
or against  
paupers.

In a case which came very recently before the Appeal Committee of the House of Lords, where a petition for leave to prosecute on appeal in *formâ pauperis*, it appeared that the petitioner sought, as one of the public, to establish a right of fishing in a tidal river adjoining land belonging to the defender, and that subscriptions had been collected to assist the petitioner in the litigation, it was decided that as the question involved was one respecting an alleged *public right*, leave to appeal in *formâ pauperis* ought not to be granted <sup>(2)</sup>.

It frequently happens that the defendant in his turn has

<sup>(1)</sup> See as to proceedings by and against paupers, R. S. C. 1883, Order xvi. r. 22-31, inclusive; and see *Tucker v. Collinson*, 16 Q. B. D. 562, as to right of pauper to be heard in person where no counsel assigned;

*Re Robinson*, 33 Ch. D. 265, as to married women appealing in *formâ pauperis*; *Carson v. Pickersgill & Sons*, 14 Q. B. D. 859, as to costs.

<sup>(2)</sup> *Bowie v. Marquis of Ailsa*, 13 App. Cas. 371.

some right or claim more or less connected with the subject-matter of the action, which he desires to enforce against some third person. Special provision is made for meeting cases of this description, so as to enable all the questions in dispute to be determined in one action.

Third-party notice.

Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the Court or a judge, issue a notice (called the *third-party notice*) to that effect, stamped with the seal with which writs of summons are sealed. A copy of this notice must be filed with the proper officer and served on the party according to the rules relating to the service of writs of summons. This notice must state the nature and grounds of the claim, and must, unless otherwise ordered by the Court or a judge, be served within the time limited for delivering the defence. A copy of the statement of claim, or if there be no statement of claim, then a copy of the writ, must be served along with the third party notice <sup>(1)</sup>.

The policy of the law expressed in the rule is plain. If A. is suing B., and B. denies his right to sue, but says, "even if he is entitled to sue, C. has indemnified me; let him come here and fight his own battle, or help me to fight mine," the object of the rule of procedure is that there should be a discussion and a decision once for all, of the real substance of the dispute <sup>(2)</sup>.

In giving leave to a defendant to serve notice of claim for contribution or indemnity on a third party, the Court will not consider whether the claim is a valid one, but only whether the claim is *bona fide*, and whether if established it will result in contribution or indemnity <sup>(3)</sup>.

Contribution or indemnity against co-defendant.

Where a defendant claims to be entitled to contribution or indemnity against *any other defendant* to the action, a notice may be issued and the same procedure is to be adopted, for the determination of such questions between the defendants, as would be issued and taken against such other defendant, were he a third party.

Sometimes during the course of an action or other proceeding,

<sup>(1)</sup> R. S. C., 1883, Order xvi. rr. 48-55.

<sup>(2)</sup> Per Bacon, V.C., *Edison and Swan United Electric Light Co. v. Holland*, 33 Ch. D. 499; and see *Carshore v. North Eastern Railway Co.*, 29 Ch. D. 344; *Johnstone v. Salvage Association*, 19 Q. B. D. 458; *Birmingham and District Land Co. v.*

*London and North Western Railway Co.*, 34 Ch. D. 261.

<sup>(3)</sup> The Court of Appeal has intimated that if the third party objects to the order bringing him before the Court, he has a right to appeal against it: *Barton v. London and North Western Ry. Co.*, 38 Ch. D. 147.

one of the parties to it marries, dies, or becomes bankrupt, and where an action became defective in this way, it is technically said to "abate." The rules provide that:—

Abate-  
ment.

A cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite* <sup>(1)</sup>. This rule applies only when the cause of action survives or continues in some person who is before the Court, and accordingly, where a sole plaintiff went into liquidation (for this purpose the equivalent of bankruptcy (see *post*, p. 913)), and a trustee was appointed, and no one appeared at the trial, either for the plaintiff or for his trustee, the Court considered that the action had abated, and ordered the action to be struck out of the list <sup>(2)</sup>. An addition was introduced by the Rules of 1883, that:—

Whether the cause of action survives or not, there shall be no abatement by reason of the death of either party, between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death.

In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to a cause or matter, the Court or a judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party, be made a party, or be served with notice of the proceedings. The Court has power to impose terms, and generally to make such order for the disposal of the cause or matter as may be just <sup>(3)</sup>.

(1) R. S. C., 1883, Order xvii. r. 1. See as to this rule *Stanhope v. Stanhope*, 34 W. R. 447, and see as to the maxim *actio personalis moritur cum persona*, *ante*, p. 497.

(2) *Eldridge v. Burgess*, 7 Ch. D. 411.

(3) R. S. C., 1883, Order xvii. r. 2: see *Atkins v. Shepherd*, 43 Ch. D. 131; *Jones v. Simes*, 43 Ch. D. 607.

## CHAPTER III.

## SERVICE OF WRIT.

Object of  
service.

When the proper indorsements have been made on the writ it must be served on the defendant or defendants, as the case may be, either personally or on a solicitor authorized to accept service on his or their behalf. "The object of all service," said Lord Cranworth in a well-known case, "is of course only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required" <sup>(1)</sup>. No service of the writ is required where the defendant by his solicitor undertakes in writing to accept service and enters an appearance. In such cases a copy of the writ is usually left at the solicitor's office. A solicitor not entering an appearance in pursuance of a written undertaking to do so, is liable to attachment <sup>(2)</sup>.

Substi-  
tuted  
service.

If in any case the plaintiff is unable to effect prompt personal service, the Court or judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may be just <sup>(3)</sup>.

Every application to the Court or a judge for an order for substituted or other service, or for the substitution of notice for service, must be supported by an affidavit setting forth the grounds upon which the application is made.

The object of the rule was stated by the Court of Appeal to be to obviate the difficulties that the plaintiff might be exposed to by reason of a defendant's going abroad and keeping abroad, and it being impossible to effect personal service, and to prevent the plaintiff's right being entirely defeated by reason of these difficulties. The intention of the framers of the rule was to

<sup>(1)</sup> *Hope v. Hope*, 4 De G. M. & G. 328, 342.

<sup>(2)</sup> R. S. C., 1883, Order IX. r. 1; Order XII. r. 1<sup>st</sup>; see generally as to service of orders, &c. : Order LXVII.

<sup>(3)</sup> R. S. C., 1883, Order IX. r. 2, and see Order LXVII. r. 6, as to substituted service of notice of pleadings.

enable the Court in such cases to order substituted service, and that when such substituted service was directed it should have all the effects of personal service <sup>(1)</sup>.

The principle upon which the Court proceeds in directing substituted service is that substituted service should be ordered :—

Substituted service.

1. Upon such persons as are impliedly authorized to accept that particular service, or ;

2. Upon persons who will certainly communicate the process so served to the party. Thus it has been ordered upon general agents, special agents, former solicitors, &c. <sup>(2)</sup>.

“It is,” as was said by an eminent judge, “the essential foundation of the administration of justice, that a person against whom an action or other proceeding is brought, should have notice of the proceedings before he is concluded ” <sup>(3)</sup>.

The Court, when an application for leave to effect substituted service is made, decides as to the propriety of granting it, and if service be effected according to the order, it is, while the order remains undischarged, equivalent for all purposes to actual service.

Substituted service will not be ordered, unless there be reasonable ground shewn for supposing that the person so served will have notice of it <sup>(4)</sup>.

Where a solicitor is acting for the party, substituted service on him may properly be ordered, and so upon any other persons with whom the Court is satisfied that the party is in communication.

The rules have also made special provisions for service in the following cases :—

Special provisions as to service.

When husband and wife are both defendants, they shall both be served, unless the Court or a judge shall otherwise order <sup>(5)</sup>.

When an infant is a defendant, service on his father or guardian, or if none, then upon the person with whom the infant resides or under whose care he is, shall, unless the Court or a judge otherwise orders, be deemed good service on the infant. The Court or judge may, however, order that service on the infant shall be deemed good service <sup>(6)</sup>.

When a lunatic or person of unsound mind not so found by inquisition is a defendant, service on the committee of the lunatic, or on the person with whom the person of unsound

<sup>(1)</sup> *Watt v. Barnett*, 3 Q. B. D. 186, 366.

*Barnett*, 3 Q. B. D. 185.

<sup>(2)</sup> *Furber v. King*, 29 W. R. 535.

<sup>(3)</sup> Annual Practice, p. 226.

<sup>(5)</sup> R. S. C., 1883, Order ix. r. 3.

<sup>(4)</sup> Per Cockburn, C.J., *Watt v.*

<sup>(6)</sup> R. S. C., 1883, Order ix. r. 4.

mind resides, or under whose care he is, shall, unless the Court or a judge otherwise orders, be deemed good service on him <sup>(1)</sup>.

Action to  
recover  
land.

Service of a writ of summons in an action to recover land may, in case of vacant possession, when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property <sup>(2)</sup>.

The person serving a writ of summons must, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ must mention the day on which such indorsement was made. This rule applies to substituted as well as other service <sup>(3)</sup>.

A complete revolution with regard to the subject of service out of the jurisdiction has been introduced by the Rules of the Supreme Court, 1883, O. xi. Under the former practice the Court had a discretion as to allowing service out of the jurisdiction.

The present rule, as was stated by Sir George Jessel in a leading case is, however, intended to supersede the old practice and to be exhaustive, and to form a complete code upon the subject of service out of the jurisdiction.

Service out  
of juris-  
diction.

Service out of the jurisdiction of the writ or notice of the writ may be allowed by the Court or a judge in the seven following cases, viz., whenever—

- (a.) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or
- (b.) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or
- (c.) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

<sup>(1)</sup> R. S. C., 1883, Order ix. r. 5. As to service on partners, see *ante*, p. 706; and as to service on corporations, &c., see Order ix. r. 8, the general principle of which is that the service must be effected on some chief officer of the defendant body; and see also *Newby v. Von Oppen*, L. R. 7 Q. B. 293 *Lhoneux v. Hong Kong*

*Banking Corporation*, 33 Ch. D. 446, where it was held that service on the head manager of the London agency of the bank was good service.

<sup>(2)</sup> R. S. C., 1883, Order ix. r. 9. See as to service in Admiralty actions, *post*, p. 1050.

<sup>(3)</sup> R. S. C., 1883, Order ix. r. 15.

- (d.) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England; or
- (e.) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or
- (f.) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or
- (g.) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

Service out  
of juris-  
diction.

Service out of the jurisdiction, said one of the judges of the Court of Appeal in a leading case upon the subject, "is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over British subjects wherever they may be, such jurisdiction is valid, but apart from statute a Court has no power to exercise jurisdiction over any one beyond its limits" (1).

(1) *Re Eager, Eager v. Johnstone*, 22 Ch. D. 86; *In re Busfield, Whaley v. Busfield*, 32 Ch. Div. 123; *Marshall v. Marshall*, 38 Ch. D. 330; *Re Burland's Trade-mark*, 41 Ch. D. 542; *Kinahan v. Kinahan*, 45 Ch. D. 78; and as to third-party notice: *Dubout & Co. v. Macpherson*, 23 Q. B. D. 340; and see Brett's Leading Cases in Equity, p. 304, *et seq.*

The following documents may be served out of the jurisdiction:—

Third-party notices, under Order XVI. r. 48: *Swansea Shipping Co. v. Duncan*, 1 Q. B. D. 644.

Counter-claims: *In re Luckie*,

*Badham v. Nixon*, W. N. 1880, p. 12.

A notice to settle the list of contributories of a company: 35 Ch. D. 1, and see *Re Liebig*, W. N. 1888, p. 120.

The following documents cannot be served out of the jurisdiction:—

An originating summons: *In re Busfield, Whaley v. Busfield*, *supra*.

A summons or order to tax a solicitor's costs: *Re Maughan. Ex parte Brandon*, 22 W. R. 738.

A summons for taxation of costs: *Ex parte Brandon*, 34 W. R. 352.

Orders made during the winding-up of a company: *In re Anglo-*

Service out  
of juris-  
diction.

Where leave is asked from the Court to serve a writ in Scotland or Ireland, if it appears to the Court that there may be a concurrent remedy in Scotland or Ireland (as the case may be) the Court is to have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant, or person sought to be served, and particularly in cases of small demands to the powers and jurisdiction, under the statutes establishing or regulating them, of the Sheriffs' Courts, or Small Debts Courts in Scotland, and of the Civil Bill Courts in Ireland, respectively <sup>(1)</sup>.

The plaintiff must shew to the satisfaction of the Court that he has a probable cause of action, and the Court in exercising the discretion which is given it by the rule will consider the facts appearing on the affidavits so far as may be necessary <sup>(2)</sup>.

Every application for leave to serve a writ or notice on a defendant out of the jurisdiction must be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave will be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this order.

The order giving leave to effect the service or give the notice must limit a time within which the defendant is to enter an appearance. The time limited depends on the place or country where or within which the writ is to be served or the notice given.

When the defendant is neither a British subject, nor in British dominions, notice of the writ, which is to be given in the manner in which writs of summons are served, and not the writ itself, is to be served upon him <sup>(3)</sup>.

The practice with regard to service out of the jurisdiction has been judicially stated as follows:—

The applications for leave to issue and for leave to serve are made in Chambers, either separately or simultaneously. When

*African Steamship Co.*, 32 Ch. Div. 348.

<sup>(1)</sup> See *Kinahan v. Kinahan*, 45 Ch. D. 78.

<sup>(2)</sup> *Société Générale de Paris v. Dreyfus*, 29 Ch. D. 239; 37 Ch. D. 215; and see also *Lenders v. Anderson*, 12 Q. B. D. 50; *Agnew v. Usher*, 14 Q. B. D. 78; *Speller & Co. v.*

*Bristol Steam Navigation Co.*, 13 Q. B. D. 96; and see as to the various points which the affidavit must state with the utmost clearness: *Annual Practice*, p. 232.

<sup>(3)</sup> R. S. C., 1883, Order XI. rr. 5, 6, 7; and see *Hewitson v. Fubre*, 21 Q. B. D. 6.



they are made separately, a copy of the writ is, in the first instance, brought to the chief clerk of the judge, with whose name it is to be marked, and a verbal statement is made to him of the nature of the action, whereupon, unless the case is one which requires to be brought under the personal consideration of the judge, a course which is adopted in all but very plain cases, the chief clerk indorses on the copy of the writ the leave to issue it, and then the subsequent order, giving leave to serve the writ thus issued, is made upon affidavit intituled in the action. If the applications are made simultaneously the application for leave to serve is supported by affidavit intituled in the matter of the intended action <sup>(1)</sup>.

Service out  
of jurisdiction.

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(1) Per Hall, V.C., in *Stigand v. Stigand*, 19 Ch. Div. 460.

## CHAPTER IV.

## WRIT OF SUMMONS.

Renewal of writ-

A writ of summons remains in force for twelve months from the day of its date. As difficulties may arise in serving a writ, the rules provide that if any defendant named in the writ has not been served with it the plaintiff may renew the writ for six months longer by leave of the Court or a judge, which must be obtained within the twelve months <sup>(1)</sup>. It has been decided that the Court has no power to extend the time for renewing a writ of summons where the claim would, in the absence of such renewal, be barred by the Statute of Limitations <sup>(2)</sup>. The rules also provide that the plaintiff may, at any time during the twelve months which the writ has to run, issue one or more *concurrent* writ or writs, which, however, only remain in force for the same time as the original writ <sup>(3)</sup>.

Appearance.

We have next to consider appearance, which may be described as the process by which the defendant submits to the jurisdiction of the Court.

On this subject the rules provide that, except in the cases otherwise provided for, a defendant must enter his appearance in London at the central office <sup>(4)</sup>.

If any defendant to a writ issued in a district registry resides or carries on business within the district, he must appear in the district registry <sup>(5)</sup>.

If any defendant neither resides nor carries on business in the district, he may appear either in the district registry or at the central office <sup>(6)</sup>.

If a sole defendant appears, or all the defendants appear in the district registry, or if all the defendants who appear appear in the district registry and the others make default

(1) Order VIII. r. 1; see as to writ issued before Judicature Act, *Hume v. Somerton*, 25 Q. B. D. 239.

(2) *Doyle v. Kaufman*, 3 Q. B. D. 7.

(3) Order VI. r. 1, and see *Small-*

*page v. Tonge*, 17 Q. B. D. 644.

(4) R. S. C., 1883, Order XII. rr. 1, 2.

(5) R. S. C., 1883, Order XII. r. 4.

(6) R. S. C., 1883, Order XII. r. 5.

in appearance, then, subject to the power of removal conferred by a subsequent rule, the action proceeds in the district registry.

Appearance is entered by the defendant delivering to the proper officer a memorandum in writing, dated on the day of its delivery, and containing the name of the defendant's solicitor, or stating that the defendant defends in person. A duplicate of the memorandum is at the same time delivered to the officer, which is sealed with the official seal, showing the date, and serves as a certificate that the appearance was entered on the day indicated by the seal. Entry of appearance.

Notice of the appearance must also be given on the same day to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself. When the appearance is entered, a note should be made in the cause-book "statement of claim required," or "not required," as the case may be (see *post*, p. 730) <sup>(1)</sup>.

Where a defendant appears by a solicitor he must state in his memorandum his place of business, and, if the appearance is entered in the central office, a place, to be called his "address for service," which shall not be more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice, and if the appearance is entered in a district registry, a place, to be called his "address for service," which shall be within the district, and where any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor. A similar rule is prescribed in the case of a defendant who appears in person.

If the memorandum does not contain such address it will not be received; and if the address given is illusory or fictitious, the appearance may be set aside by the Court on the application of the plaintiff <sup>(2)</sup>.

If two or more defendants in the same action appear by the same solicitor and at the same time, the names of all the defendants so appearing must be inserted in one memorandum.

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<sup>(1)</sup> R. S. C., Order XII. rr. 1-9; P. M. R. (11), Part V. The form of notice of entry of appearance is given: R. S. C., 1883, App. A., Part II., No. 2; and see *Smith v. Dobbin*, 3 Ex. D. 338, where as the defendant had not given notice at the proper address the Court decided

that judgment signed in default of appearance could not be set aside without an affidavit of merits and payment of costs.

<sup>(2)</sup> R. S. C., 1883, Order XII. As to appearance when the defendants are sued as partners, see *ante*, p. 706.

Appear-  
ance.

A solicitor not entering an appearance, in pursuance of his written undertaking so to do, is liable to an attachment.

A defendant may appear at any time before judgment; but if he appear at any time after the time limited by the writ for appearance, which is eight days within the jurisdiction, and varies in cases out of the jurisdiction, he shall not, unless the Court otherwise order, be entitled to any further time for delivering his defence, or for any other purpose, than if he had duly appeared.

Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the Court appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or by his tenant; and when a person defends as landlord, being in possession only by his tenant, he must state in his appearance that he appears as landlord.

We shall now proceed to consider the course to be adopted when the defendant fails to appear.

Failure to  
appear.

Where a defendant is an infant or person of unsound mind not so found by inquisition, and default is made in entering appearance, the plaintiff must before proceeding further with the action apply to the Court for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action.

Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance, he must before proceeding in default, file an affidavit of service, or of notice in lieu of service, as the case may be. The plaintiff's further course depends upon the nature of his claim.

Where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails, or all the defendants, if more than one, fail, to appear thereto, the plaintiff may enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of 5 per cent. per annum, to the date of the judgment and costs. The rate of interest after judgment is 4 per cent.

Where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and there are several defendants, some only of whom appear, the plaintiff may enter final judgment, and issue execution therein against such as have not appeared, without prejudice to his right to proceed with the action against such as have appeared.

Similarly, where the writ is indorsed with a claim for deten-

tion of goods and damages, or either of them, and no defendant appears, the plaintiff may enter "interlocutory" judgment with a writ of inquiry as to the value of the goods and damages, or damages only, and an analogous course may be taken where there are several defendants, some of whom fail to appear <sup>(1)</sup>.

Default of  
appearance.

The rules then go on to make provision on similar lines with regard to cases where there is default of appearance, and there are combined claims for detention of goods, damages, and liquidated demands, by allowing final or interlocutory judgment, as the case may be.

If the defendant fails to appear in an action for the recovery of land, or appears, but limits his defence to part only of the land, the plaintiff may enter judgment "that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply." There is also a special provision on a similar principle as before where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, upon a writ for the recovery of land.

The Court may set aside or vary a judgment entered pursuant to any of the foregoing rules upon such terms as may be just <sup>(2)</sup>.

Where a defendant fails to appear to a writ of summons issued out of a district registry, and the defendant had the option of entering an appearance either in the district registry or in the central office, judgment for want of appearance shall not be entered by the plaintiff until after such time as a letter posted in London on the evening previous to the last day for entering appearance, in due time for delivery to him on the following morning, ought, in due course of post, to have reached him.

In all actions "not otherwise specially provided for" (a category which includes the great majority of actions which come before the Chancery Division), if the party served with the writ does not appear within the proper time, the plaintiff must file an affidavit of service, and unless the writ is specially indorsed a statement of claim as well, and the action will then proceed as if the party had appeared, subject as to cases where

(<sup>1</sup>) R. S. C., 1883, Order XIII. r. 1, which see as prior service of the writ and notice to the father or guardian of the infant : see also *Taylor v. Pede*, 29 W. R. 627.

(<sup>2</sup>) R. S. C., 1883, Order XIII. 3-10, inclusive; as to the terms on which

the Court will set aside a judgment see *Attwood v. Chichester*, 3 Q. B. D. 722; *Jaques v. Harrison*, 12 Q. B. D. 136; and see rule 11 as to writs issued out of a district registry; and see as to default of appearance in Admiralty actions, *post*, p. 1091.

an account is claimed, to the provisions of Order xv., as to which, see *post*, p. 726 <sup>(1)</sup>.

Specially  
indorsed  
writ.

In certain cases the plaintiff may obtain judgment after appearance without pleading. This is effected by means of the *specially indorsed writ*, to which reference has already been made (see *ante*, p. 704).

The Judicature rules provide that where the defendant appears to a writ of summons specially indorsed, the plaintiff may, on affidavit made by himself, or by any other person <sup>(2)</sup> who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for the amount so indorsed together with interest, if any, or for recovery of the land (with or without rent or mesne profits), as the case may be, and costs. The judge may thereupon, unless the defendant by affidavit or otherwise shall satisfy him that he has a good defence to the action on the merits or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly.

The policy of the law in this and kindred cases was thus stated in a leading case on the subject in the House of Lords: "If a man," said Lord Hatherley, "really has no defence, it is better for him, as well as his creditors, and for all the parties concerned, that the matter should be brought to an issue as speedily as possible; and, therefore, there was a power given in cases in which plaintiffs might think they were entitled to use the power by which, if it was a matter of account, an account might be immediately obtained upon the filing of a bill; or, if it was a matter in which the debt was clear and distinct, and in which nothing was needed to be said or done to satisfy a judge that there was no real defence to the action, recourse might be had to an immediate judgment and to an immediate execution" <sup>(3)</sup>.

On the other hand, as stated by Lord Blackburn in the same case, there may be facts brought before the judge which satisfy him that it is reasonable sometimes with terms, some-

<sup>(1)</sup> R. S. C., 1883, Order XIII. r. 12. See as to the practice introduced by the rules of 1883, when the writ is indorsed with a claim on a bond within 8 & 9 Wm. 3, c. 11; Order XIII. r. 14; *Preston v. Dania*, L. R. 8 Ex 19; *Tulhen v. Caralampi*, 59 L. T. 141.

<sup>(2)</sup> Under the rules of 1875 the plaintiff alone could make the affidavit, but now any one who can give positive testimony may make the affidavit.

<sup>(3)</sup> *Wallingford v. Mutual Society*, 5 App. Cas. 699.

times without, that the defendant should be able to raise this question and fight it, although the judge is by no means satisfied that it does amount to a defence on the merits.

Specially  
indorsed  
writ.

The practice with reference to applications under Order xiv. r. 1, may be shortly stated as follows: the plaintiff applies by summons, supported by affidavit, returnable not less than four clear days after service.

The defendant may shew cause against such application by affidavit, or (except in actions for the recovery of land) by offering to bring into Court the sum indorsed on the writ. But it must be borne in mind that though it is by no means necessary that the defendant should have a complete defence before he can obtain leave to defend, yet he is not entitled as of right, on paying money into Court, to an order giving him leave to defend. He must shew something in the nature of a real and *bonâ fide* defence. The affidavit must state whether the defence alleged goes to the whole or to part only, and (if so) to what part, of the plaintiff's claim. And the judge may, if he think fit, order the defendant, or in the case of a corporation, any officer thereof, to attend and be examined upon oath: or to produce any leases, deeds, books, or documents, or copies of or extracts therefrom. The Court has a discretionary power to allow the plaintiff to answer the defendant's case <sup>(1)</sup>.

Judgment may be given for part only of the amount claimed, or against some only of the defendants, and leave to defend may be given either unconditionally or subject to terms. A further rule, which came into operation on the 1st of January, 1886, empowers the Court or a judge by consent to dispose of the action finally and without appeal in a summary manner, and on such terms as to costs or otherwise as the Court or judge shall think just.

A special indorsement has been held to apply to the following, among other instances: Work and labour; money paid; money lent; foreign judgment debt; guarantees; trust; land; but not to actions for arrears of alimony <sup>(2)</sup>. It has been decided that a writ is specially indorsed within the meaning of Order III. r. 6, and Order xiv., if the indorsement gives sufficiently specific particulars to bring to the mind of the defendant knowledge as to what the plaintiff's claim is <sup>(3)</sup>. "The

<sup>(1)</sup> *Davis v. Spence*, 1 C. P. D. 721; *Girvin v. Grepe*, 13 Ch. D. 174.

<sup>(2)</sup> *Bailey v. Bailey*, 12 Q. B. D. 855; see, as to land, *Casey v. Hellyer*, 17 Q. B. D. 97; and see Annual Practice, note to Ord. 3, r. 6, for an

enumeration of other cases to which the practice is or is not applicable. See, as to application after delivery of defence, *McLardy v. Slateum*, 24 Q. B. D. 501.

<sup>(3)</sup> *Bickers v. Speight*, 22 Q. B. D. 7.

defendant is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist" (1).

Accounts.

Somewhat analogous to the power thus conferred on a plaintiff of obtaining final judgment, in a case where there is no real defence, are the very extensive powers which are conferred upon the Court of directing accounts in cases where such a course is clearly desirable.

Order xv. r. 1, provides that where a writ of summons has been indorsed for an account, or where the indorsement on a writ of summons *involves taking an account* (2), if the defendant either fails to appear, or does not after appearance, by affidavit or otherwise, satisfy the Court or a judge that there is some preliminary question to be tried, an order for the proper accounts, with all necessary inquiries and directions, is to be forthwith made.

An application for such an order is made by summons, supported by an affidavit when necessary, filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. The application may be made at any time after the time for entering an appearance has expired.

In addition to this, a subsequent order confers a power upon the Court or a judge at any stage of the proceedings in a cause or matter, to direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner (3).

It is also provided that the Court or a judge, may, either by the judgment or order directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account, the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised (4).

(1) Per Cockburn, C.J., cited with approval, *Bickers v. Speight*, 22 Q. B. D. 7.

(2) This is an addition introduced by R. S. C. 1883.

(3) Order xxxiii. r. 2; the practice as to the mode of vouching accounts, &c., is contained in the subsequent rules of this order.

(4) It was decided in *Holgate v.*

*Shutt*, 28 Ch. D. (C.A.) 111, that under an order directing an account and not referring to settled accounts, the accounting party may set up settled accounts, though the order does not direct that settled accounts shall not be disturbed, and the opposite party may impeach them, though the order does not expressly give him liberty to do so.



A new practice was introduced by Order xxxiii. r. 4, providing that upon the taking of any account the Court or a judge may direct that the vouchers shall be produced at the office of the solicitor of the accounting party, or at any other convenient place, and that only such items as may be contested or surcharged shall be brought before the judge in chambers.

## CHAPTER V.

## PLEADINGS.

Hitherto our attention has been practically confined to cases where, to a certain extent, at all events, the defendant is practically without defence—where the plaintiff is beyond question entitled to an immediate judgment for a clear and distinct debt, or to an immediate order for an account—where, in Lord Hatherley's words, which we have already quoted (*ante*, p. 724 (1)), it is better for the defendant and for all parties concerned, that the matter should be brought to an issue as speedily as possible.

It must, however, be borne in mind that in a considerable number of actions, and especially in those which are assigned to the Chancery Divisions, it is not possible for the plaintiff to obtain judgment in the summary mode we have just described. In such cases the plaintiff after issuing his writ must deliver to the defendant a document called "a statement of claim," which consists of a statement of the material facts on which the plaintiff relies, and concludes with a claim for the specific relief to which the plaintiff conceives himself entitled.

Statement  
of claim.

Defence.

The defendant thereupon, unless prepared to admit the plaintiff's case, puts in a "defence," containing a statement of the facts on which he in his turn relies. The plaintiff's next step is a "reply," and these three pleadings, a statement of claim, a defence, and a reply, are the only pleadings which can be delivered without leave.

Reply.

Object of  
pleading.

The object of the rules as to pleading, said Baron Bramwell (2), is threefold. It is: (1) that the plaintiff may state what his case is for the information of the defendant, and that the plaintiff may be tied down to it and not spring a new case on the defendant; (2) that the defendant may be at liberty to say that the statement is not sufficient in point of law; and (3) that the defendant, instead of being driven to deny every-

(1) *Wallingford v. Mutual Society*,  
5 App. Cas. 699.

127, 131; *Thorp v. Holdsworth*, 3  
Ch. D. 639.

(2) *Phillips v. Phillips*, 4 Q. B. D.

thing by an ambiguous and uncertain statement, involving conclusions of law as well as actual facts, and so going down to try an expensive issue, may be at liberty to single out any one statement and to answer it. The whole object of pleading, said Sir George Jessel, is to bring the parties to an issue, and the meaning of the order is to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was.

Object of pleading.

The rules on the subject of "pleading" now in force in the High Court of Justice are contained in Order XIX. of the Rules of the Supreme Court. The effect of the more important of them may be briefly stated as follows:—

Effect of rules as to pleading.

Every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved and must, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers are to be expressed in figures and not in words. Signature of counsel is not necessary; but where pleadings have been settled by counsel or a special pleader they must be signed by him; and if not so settled they must be signed by the solicitor, or by the party if he sues or defends in person.

There is nothing in the rules to prevent a litigant from setting up inconsistent cases. In a recent case, one of the judges of the Court of Appeal said, "I cannot construe the order (Order XIX.) as prohibiting inconsistent pleadings. One sees perfectly well what is meant by it, viz. that each party is to state succinctly and concisely, and in a summary form, the material facts on which he relies. Now a person may rely upon one set of facts, if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them" <sup>(1)</sup>.

The Courts set their face against undue prolixity in pleading, and any transgression in this respect will be visited with costs. The rules provide forms in the appendices, which are to be followed when applicable, or as nearly as circumstances will admit. It has been, however, laid down judicially that the forms need not be rigidly followed when they are insufficient, and that the pleader must exercise his discretion <sup>(2)</sup>.

In all cases in which the party pleading relies on any misre-

<sup>(1)</sup> *In re Morgan*, 35 Ch. D. 499.

<sup>(2)</sup> *The Isis*, 8 P. D. 227.

Particulars. presentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms given in the appendices to the rules, particulars (with dates and items, if necessary) must be stated in the pleading. The object of particulars is to enable the party calling for them to know what case he has to meet, and the Court has power to order a further and better statement of claim or defence, or further and better particulars on such terms as may be just <sup>(1)</sup>.

Multifariousness abolished.

A difficulty which in old days used frequently to encounter the pleader was that his pleading might be objected to on the ground that it was "multifarious," *i.e.*, that it attempted to embrace too many objects in the same suit <sup>(2)</sup>. But the objection for multifariousness has now, as was pointed out by the Court of Appeal, received its quietus by the express enactment of the Judicature Act <sup>(3)</sup>.

It has been already stated that the plaintiff may join as defendants all the persons against whom he claims relief <sup>(4)</sup>.

Proceeding on a similar principle, the Judicature Rules have provided that, subject to the rules, the plaintiff may unite in the same action several causes of action. If, however, it appear to the Court that any such causes of action cannot be conveniently tried or disposed of together, the Court may order separate trials of any such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

An exception from this principle must be noticed, as the rules provide that no cause of action shall, unless by leave of the Court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent, or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed.

Every pleading must be delivered between parties. It must also be marked on the face with the date of the day of delivery,

<sup>(1)</sup> R. S. C., 1883, Order xix. r. 7. If the particulars be of debt, expenses, or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading, see as to particulars: *Leitch v. Abbott*, 31 Ch. D. 374; *Newport v. Painter*, 34 Ch. D. 88; *Whyte v. Ahrens*, 26 Ch. D. 417;

*Falck v. Axthelm*, 24 Q. B. D. 174.

<sup>(2)</sup> Daniell's Chancery Pr., 6th ed. p. 420; *Millar v. Harper*, 38 Ch. D. 110; *Spedding v. Fitzpatrick*, 38 Ch. D. 410.

<sup>(3)</sup> *Cox v. Barker*, 3 Ch. D. 359, *per James, L.J.*

<sup>(4)</sup> *Helmore v. Smith*, 35 Ch. D. 436; Order xviii. rr. 1, 2.

the reference to the letter and number of the action, the division to which, and the judge (if any) to whom the action is assigned, the title of the action, and the description of the pleading. It must also be indorsed with the name and place of business of the solicitor and agent, if any, delivering it, or the name and address of the party delivering it if he acts without a solicitor.

Rules as to  
pleading.

Each party must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all grounds of defence or reply, which would be likely, if not raised, to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, *e.g.*, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds <sup>(1)</sup>.

Neither party is allowed to indulge in general denials, but each must deal specifically with each allegation of fact of which he does not admit the truth, except damages. The denial must not be evasive, but must answer "the point of substance." A bare denial of a contract is to be taken as a denial of the fact, and not of the legality of the contract. No denial is necessary as to damages or their amount.

Pleadings must not be frivolous, vexatious, scandalous, or embarrassing, and the Court possesses the amplest powers of striking out and amending pleadings.

The defence to an action for the recovery of land is dealt with by a special rule, which provides that a defendant in such an action who is in possession by himself or his tenant need not plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground. "But, except in these cases, it is sufficient to state by way of defence that he is so in possession, and it shall be taken to be implied in such statement that he denies or does not admit the allegations of fact contained in the plaintiff's statement of claim. He may nevertheless rely upon any ground of defence which he can prove except as hereinbefore mentioned" <sup>(2)</sup>.

Defence to  
action for  
recovery of  
land.

The plaintiff is not bound to deliver a statement of claim unless the defendant gives notice in writing that he requires

<sup>(1)</sup> See also as to the effect of denials: Order XXI. rr. 2, 3; Order XXV. rr. 2, 4.

<sup>(2)</sup> See as to actions for recovery of land, *Phillips v. Phillips*, 4 Q. B. D.

127; *Danford v. McAnulty*, 8 App. Cas. 456; *Lyell v. Kennedy*, 8 App. Cas. 217; *Ind Coope & Co. v. Emerson*, 12 App. Cas. 300.

Statement  
of claim.

it, in which case it must, unless otherwise ordered by the Court, be delivered at any time within five weeks after notice. The plaintiff may, however, without being required, voluntarily deliver a statement of claim, except where the writ is specially indorsed, in which case no statement of claim can be delivered, the indorsement being treated as a statement of claim.

When the plaintiff intends to proceed in default of appearance, he must in certain cases file a statement of claim: see Order XIII., r. 12.

When a statement of claim is delivered the plaintiff may by it alter, modify, or extend his claim without amending his writ.

The statement of claim must state specifically the relief claimed, and when relief is sought in respect of separate and distinct grounds, they must, as far as may be, be separately stated.

A defendant in resisting the plaintiff's claim may either simply dispute that claim, in which case he will put in a defence; or he may set up against the plaintiff, by way of counter-claim, any claim which he may have against him; or he may combine both these courses.

Counter-  
claim.

The rules provide that a defendant in an action may set-off or set-up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim "sound in damages" or not, and such set-off or counter-claim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim.

The rules, however, empower the Court or a judge, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, to refuse permission to the defendant to avail himself of it <sup>(1)</sup>.

Defence

The time within which the defence must be delivered varies according to circumstances. The following are the provisions made by the rules upon this subject:—

1. Where a statement of claim is delivered, the defendant must deliver his defence within ten days from the delivery of the statement of claim, or from the time limited for appearance whichever shall be last, unless such time is extended by the Court or a judge. It must be borne in mind that if the defendant appears within the eight days, the time for delivery of

(1) R. S. C., 1883, Order XIX. r. 3.

defence does not under this rule begin to run until the eighth day from appearance. The defendant has therefore under this rule eighteen days to deliver his defence <sup>(1)</sup>. Defence.

2. A defendant who has appeared in an action, and who has neither received nor required the delivery of a statement of claim, must deliver his defence (if any) at any time within ten days after his appearance, unless such time is extended by the Court or a judge <sup>(2)</sup>.

3. Where leave has been given to a defendant to defend under Order xiv. (see *ante*, p. 724), he must deliver his defence (if any) within such time as may be limited by the order giving him leave to defend, or if no time is thereby limited, then within eight days after the order <sup>(3)</sup>.

A point which had given rise to some uncertainty was settled by a case decided in 1889, viz., that where a counter-claim is pleaded with a defence, the plaintiff has twenty-one days within which to deliver his reply to the defence and counter-claim <sup>(4)</sup>.

If, in any case in which the defendant sets up a counter-claim, the action of the plaintiff is stayed, discontinued, or dismissed, the counter-claim may nevertheless be proceeded with <sup>(5)</sup>.

If the defendant succeeds in establishing a set-off or counter-claim, the Court may give judgment for any balance there may be in his favour, or give him such other relief as he may be entitled to upon the merits of the case.

Unless an extension of time has been obtained the plaintiff must deliver his reply within twenty-one days after the defence or the last of the defences shall have been delivered.

No pleading subsequent to reply other than a joinder of issue can be pleaded without leave, and then only upon such terms as the Court shall think fit. The time for the delivery of such a pleading is, in the absence of special order, four days after the delivery of the previous pleading.

As soon as any party has simply joined issue upon the preceding pleading of his opponent, or has made default as herein-after mentioned (see p. 734), the pleadings as between such parties are deemed to be closed.

Special and elaborate procedure is made by the rules with regard to the somewhat rarely-occurring case of matters arising during the course of the action with regard to which the reader

<sup>(1)</sup> R. S. C., 1883, Order xxi. r. 6 :  
see *Anlaby v. Prætorius*, 20 Q. B. D.  
764.

<sup>(2)</sup> R. S. C., 1883, Order xxi. r. 7.

<sup>(3)</sup> R. S. C., 1883, Order xxi. r. 8.

<sup>(4)</sup> *Rumley v. Winn*, 22 Q. B. D.  
265.

<sup>(5)</sup> R. S. C., 1883, Order xxi. r. 16.

is referred to the Order and authorities mentioned in the note (1).

Amend-  
ment.

It must be borne in mind that the Court has the most extensive powers of amending pleadings, and never hesitates to use them when necessary in order to do justice between the parties; the principle on which it proceeds being that whenever the parties can be put in the same position for the purposes of justice that they were in when the slip was made such leave should be given (2).

Suppose now that in the course of the action one of the parties makes default in delivering a necessary pleading, what are the rights of his opponent? Order xxvii. deals with this point in the following manner:—

If the plaintiff, being bound to deliver a statement of claim (see *ante*, p. 731), does not deliver it within the proper time, the defendant may apply to the Court to dismiss the action with costs, for want of prosecution; and on the hearing of the application the Court may, if no statement of claim shall have been delivered, order the action to be dismissed, or make such other order as it thinks just (3).

Default in  
pleading.

Similarly, if the defendant, or some of the defendants, fail to deliver a defence within the proper time, the plaintiff may proceed to judgment and execution against those in default; the precise course to be adopted by the plaintiff varying according to the nature of his claim, viz., whether it is for a debt or liquidated demand, detention of goods, or damages, or the recovery of land (4).

In other cases, comprising in fact the great bulk of those brought in the Chancery Division, the plaintiff's course, when the defendant makes default in delivering a defence, is to set down the action on motion for judgment, and the Court will then give him such judgment as it considers him entitled to on the statement of claim.

If the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings are deemed to be closed at the

(1) R. S. C., 1883, Order xxiv.; and see *Toke v. Andrews*, 8 Q. B. D. 428; *Bridgetown Waterworks Co. v. Barbados Water Supply Co.*, 38 Ch. D. 378.

(2) R. S. C., Order xxviii.; *Tildesley v. Harper*, 10 Ch. D. 393; *Clara-pede v. Commercial, &c., Co.*, 32 W. R. 263; *Steward v. Metropolitan Tram-ways Co.*, 16 Q. B. D. 180. See

*Edevain v. Cohen*, 43 Ch. D. 187.

(3) *Wright v. Swindon Railway Co.*, 4 Ch. D. 164; *King v. Davenport*, 4 Q. B. D. 402; *Evelyn v. Evelyn*, 13 Ch. D. 138; *Script Phonography Co. v. Gregg*, 59 L. J. Ch. 406. In the Chancery Division an application to dismiss for want of prosecution is usually made at Chambers.

(4) R. S. C., Order xxvii. rr. 2-9.



expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue.

Any judgment by default may be set aside by the Court on such terms as it may think fit <sup>(1)</sup>.

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(<sup>1</sup>) *Watt v. Barnett*, 3 Q. B. D. 722; *Cockle v. Joyce*, 7 Ch. D. 56; 363; *Atwood v. Chichester*, 3 Q. B. D. *Anlaby v. Prætorius*, 20 Q. B. D. 768.

## CHAPTER VI.

## PAYMENT INTO COURT—DISCONTINUANCE—RAISING POINTS OF LAW.

A defendant may not be confident that he can completely defeat the plaintiff's case, but he may at the same time feel convinced that the plaintiff claims more than he would obtain from any judge or jury. In such a case his usual course is to pay money into Court. This subject is dealt with by Order xxii., the first rule of which provides that: "Where any action is brought to recover a *debt or damages*, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the Court, pay into Court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability (*except in actions or counter-claims for libel or slander*), pay money into Court." The rule then goes on to provide that the money when so paid in, shall be subject to the provisions contained in rule 6 of the same order <sup>(1)</sup>.

"Morally and practically," said Lord Coleridge in a case decided in 1889, "there is a difference between libel and other cases. Thus in an action for breach of contract, there is no reason why the defendant should not be at liberty to say: 'I never made the contract, but if I did, I say that forty shillings is enough to satisfy your claim.' But to permit a defendant, in cases where a question of character is involved, to say to the plaintiff: 'take forty shillings, or go on with your action,' is practically a very different thing" <sup>(2)</sup>.

The defence must state the fact of payment, and also the claim or cause of action in satisfaction of which the payment is made, and if the defence sets up tender of money before

<sup>(1)</sup> R. S. C., 1883, Order xxii. rr. 1, 6. Rule 1 also contains a proviso that in an action on a bond under the statute 8 & 9 Wm. 3, c. 11, payment into Court shall be admissible to particular breaches only, and not to the whole action: see *Tutcher v. Caralampi*, 21 Q. B. D. 414;

see also on the subject of payment into Court: *M'Ivorraith v. Green*, 14 Q. B. D. 766; *The William Symington*, 10 P. D. 1; *Moon v. Dickenson*, 38 W. R. 278.

<sup>(2)</sup> *Fleming v. Dollar*, 23 Q. B. D. 391; *Griffiths v. School Board of Ystradyfodwg*, 24 Q. B. D. 307.

action the sum alleged to have been tendered must be brought into Court.

The plaintiff may accept the money so paid in satisfaction of his demand, and take the money out of Court accordingly, or he may refuse to accept it.

Where money is paid into Court, with a denial of liability, it can only be dealt with subject to certain special and elaborate provisions, for which the reader is referred to Order XXII., r. 6 <sup>(1)</sup>.

Suppose now that some unforeseen doubt or difficulty should encounter any party in the course of an action, his course in that case is to take out a summons for directions under Order XXX., which provides that: "In every cause or matter one general summons for directions may be taken out at any time by any party with respect to the following matters and proceedings: particulars of claim, defence, or reply, statement of special case, discovery (including interrogatories), commissions and examinations of witnesses, mode of trial (including proceedings in lieu of demurrer, trial on motion for judgment, and reference), place of trial, and any other matter or proceeding in the cause or matter previous to trial."

Summons  
for direc-  
tions.

The summons is returnable in not less than four days, and directions may be given as to matters not expressly included in it, and if any other application is made which might have been included in the "general summons" for directions, the party in fault is to be mulcted in costs <sup>(2)</sup>.

Under the present practice the power of a plaintiff who has once set the machinery of the Court in motion to stop its course is much more limited than it was in former days; he is, in fact, much less *dominus litis* (to employ the technical phrase) than he used to be in the days before the Judicature Act. His rights in this respect are now governed by Order XXVI. <sup>(3)</sup>, under which he may, at any time before receipt of the defence, or after receipt of it before taking any other proceeding in the action, except any interlocutory application, by notice *in writing*, wholly discontinue his action against all or any of the defendants or withdraw

<sup>(1)</sup> See for the history of the law and practice as to payment into Court *Wheeler v. The United Telephone Co.*, 13 Q. B. D. 597. As to the subject of payment in and out, and the mode of dealing with the funds in Court see Annual Practice, 1890, p. 459, *et seq.*

<sup>(2)</sup> R. S. C. 1883, Order xxx. r. 2.

It is doubtful whether this summons can in the absence of special circumstances shown on affidavit be taken out before defence, see the Annual Practice, p. 527.

<sup>(3)</sup> See *Spencer v. Watts*, 23 Q. B. D. 350; *Moon v. Dickenson*, 38 W. R. 278; and see as to costs: Order XXVI. r. 4.

Discon-  
tinuance.

any part of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn, but such discontinuance or withdrawal shall not be a defence to any subsequent action. Except in this way the plaintiff has now no power to withdraw the record or discontinue the action unless by leave of the Court, or with the consent of his adversary. The Court, however, has a general power "before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may be just, to order the action to be discontinued, or any part of the alleged cause of complaint to be struck out," and there is a similar provision with regard to the position of the defendant.

It has been decided that a notice in writing by the plaintiff's solicitor in the form, "We are instructed to proceed no further with the action," is a sufficient notice of discontinuance <sup>(1)</sup>.

The general rule is that the party who discontinues pays the costs of the action <sup>(2)</sup>.

If any subsequent action is brought before payment of the costs of a discontinued action, for the same, or substantially the same, cause of action, the Court may order a stay of such subsequent action, until such costs shall have been paid.

In many cases which come before the Courts for its adjudication, there is no issue of fact between the parties, and the only point which requires to be determined is a question of law. Special provision has been made by the rules for dealing with cases of this description.

In the days before the Judicature Act, points of law were raised by demurrer. This term, which occurs not unfrequently in the older reports, was derived from the Latin *demorari* through the Norman French and signified that the party demurring declined to proceed with the pleadings because his opponent's statement was insufficient and that he arrested the judgment of the Court. The party demurring in fact said, "Admitting the truth of all that my opponent alleges, I submit to the Court that he has no case in law" <sup>(3)</sup>.

Demurrers are now abolished, but any party may raise by his pleading any point of law, which shall then be disposed of by the judge who tries the cause at or after the trial, but by con-

Raising  
points of  
law.

<sup>(1)</sup> *The Pomerania*, 4 P. D. 195.

<sup>(2)</sup> *The Henkes*, 12 P. D. 106; and see as to "test" actions, *Robinson v. Chadwick*, 7 Ch. D. 880, and as to

costs, *Windham v. Bainton*, 21 Q. B. D. 199.

<sup>(3)</sup> *Daniell's Chancery Practice*, 6th edit. 525.

sent of the parties or by order of the Court on the application of either party, the point of law so raised may be set down for hearing and disposed of at any time before the trial <sup>(1)</sup>. If in the opinion of the Court the decision of the point of law substantially disposes of the whole action or any distinct part, the Court may dismiss the action or make such other order as may be just <sup>(2)</sup>.

Another mode in which questions of law may be disposed of, is also provided by the Judicature Rules which provide that the parties to any cause or matter may, if they please, concur in stating the questions of law arising therein in the form of a "special case" for the opinion of the Court <sup>(3)</sup>.

Special case.

Every such special case must be divided into paragraphs numbered consecutively, and must concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of the case the Court and the parties are at liberty to refer to the whole contents of such documents; and the Court is at liberty to draw from the facts and documents stated in any such special case "any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial."

If it appear to the Court that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to a referee or an arbitrator, the Court may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed. No objection can be taken to any action or proceeding on the ground that it merely asks the Court to declare rights without seeking any consequential relief <sup>(4)</sup>.

(1) R. S. C. Order xxv., r. 2.

(2) R. S. C. Order xxv. r. 3. See as to the practice: *O'Brien v. Tyssen*, 28 Ch. D. 372; *Percival v. Dunn*, 29 Ch. D. 128; *Caird v. Moss*, 33 Ch. D. 23, 25.

(3) See as to special case, O. xxxiv. A special case may also be stated by order of the Court (r. 2), and the parties may agree in writing as to payment of money and costs in pursuance of the judgment (r. 4). Where a married woman (not being a party in respect of her separate property or of

any separate right of action by or against her), an infant, or person of unsound mind, not so found, is a party, leave of the Court must be obtained before setting down the special case for argument. The power of stating a special case which was given to the Court of Chancery by 13 & 14 Vict. cap. 35 (Sir George Turner's Act), and the procedure under that Act are still preserved by Order xxxiv. r. 8.

(4) R. S. C., 1883, Order xxv. r. 5.

Decision of  
question of  
law.

The late Sir George Jessel decided in a well-known case <sup>(1)</sup> to which we have previously referred in connection with the subject of partnership, that in cases where at the trial of an action the decision of a point of law may render unnecessary the determination of a question of fact, the Court will follow the analogy of the above rule and decide the question of law first. See also as to obtaining the opinion of the Court on questions of law by originating summons, *post*, p. 782

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(1) *Pooley v. Driver*, 5 Ch. D. 460, 469.

## CHAPTER VII.

## ADMISSIONS—INTERROGATORIES—DISCOVERY—INSPECTION.

And now having considered the practice in those cases in which the parties who come before the Court are agreed with regard to the facts, and the only questions with regard to which they desire the aid of the Court arise with reference to the law applicable to those facts, we pass on to consider a different class of cases—where the parties do not agree as to the facts, but where there are, as it is termed, issues of fact between them. The aim of a proper system of practice is that those issues of fact should be decided as easily and cheaply as possible, provided of course that no injustice is caused in so doing. Under the old system, before the Judicature Acts, the principles on which the Courts proceeded with regard to the subject of granting or refusing discovery, *i.e.* as to enabling a litigant to obtain before the trial a knowledge of the facts and documents on which his opponent relied, differed essentially in equity and at common law. In equity there was generally speaking an absolute right to all discovery material to the question about to be tried. At common law discovery was in the discretion of the Court. In framing the present rules as to discovery, said the present Master of the Rolls, it was the intention of the Judicature Act to introduce a new intermediate practice, following the extended principles of the Court of Chancery rather than the narrower practice of the Courts of Common Law <sup>(1)</sup>. Under the former system in conducting a suit in Chancery interrogatories of the most sweeping character were wont to be administered with a view to obtaining admissions of which the opposite party might avail himself at the trial. This practice, however, grew to much abuse, and was checked by the Rules of the Supreme Court of 1883, under which there are now the following ways provided in which each party may obtain information from the other as to what his case really is. These ways are as follows: (1) Admissions of facts and documents; (2) Interrogatories; (3) Discovery and Inspection.

Issues of fact.

Present rules as to discovery

(1.) With regard to admissions of fact—the rules contain a general provision that any party to a cause or matter may give

Admissions of fact.

(1) *Jones v. Mount Viden Gas Co.*, 5 Q. B. D. 558.

Admissions  
of fact.

notice, by his pleading, or otherwise, in writing, that he admits the truth of the whole or any part of the case of any other party.

In addition to this, another rule deals with the question of the admission of documents. Either party may call upon the other party to admit any document, saving all just exceptions and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the Court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document will be allowed, unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing-officer, a saving of expense.

A further provision on this subject, intended to obviate the expense of parties being prepared to prove facts which ought to be, and often are, admitted at the trial, was introduced by the Rules of 1883, as follows, viz. :—

Any party may by notice in writing at any time not later than *nine* days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue *only*, any specific fact or facts mentioned in the notice. And in case of refusal or neglect to make the admission within six days after service of the notice, or such further time as the Court may allow, the costs of proving such fact or facts must be paid by the party neglecting or refusing to make the admission, whatever the result of the “cause, matter, or issue” may be, unless the Court otherwise directs or certifies that the refusal to admit was reasonable. It must be borne in mind, however, that any such admission is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and cannot be used on any other occasion or in favour of any person other than the party giving the notice <sup>(1)</sup>.

The next provision, with regard to the use which may be made of admissions, is of the greatest possible practical importance.

Any party <sup>(2)</sup> may at any stage of a cause or matter, where

<sup>(1)</sup> R. S. C. Order XXXII., r. 4; and see *Brown v. Watkins*, 16 Q. B. D. 129; *Shaw v. Smith*, 18 Q. B. D. 193. See further on the subject of discovery: *Bustros v. White*, 1 Q. B. D. 426; *Anderson v. Bank of Columbia*, 2 Ch. Div. 654, 658; *Church v. Wilson*, 9 Ch. D. 554; *Parker v. Wells*, 18 Ch. D. 485; *China, &c., Co. v. Commercial &c., Co.*, 8 Q. B. D. 145 (C. A.); *Bolkow v. Fisher*, 10 Q. B. D. 168; *Kearsley v. Phillips*, 10 Q. B. D. 466; *Jones v. Monte Video*

*Gas Co.*, 5 Q. B. D. 558; *Aste v. Stumore*, 13 Q. B. D. 329, 330; *Attorney-General v. Gaskill*, 20 Ch. D. 525, 526, 530 (C. A.); *Leitch v. Abbott*, 31 Ch. D. 374; *Re Holloway*, 12 P. D. 167; *Marriott v. Chamberlain*, 17 Q. B. D. 163; *Lyell v. Kennedy*, 8 App. Cas. 217; *Fennessy v. Clark*, 37 Ch. D. 184; *Humphries v. Taylor Drug Co.*, 39 Ch. D. 693.

<sup>(2)</sup> R. S. C. 1883, O. XXXII., r. 6. Admissions may be amended or withdrawn by leave of the Court.



admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as it may think just <sup>(1)</sup>.

Judgment  
or order  
upon  
admissions.

(2) The practice as to administering interrogatories to the opposite party is dealt with by Order xxxi. of the Rules of the Supreme Court, 1883, which alters very materially the preceding practice, not only by limiting the cases in which discovery can be obtained without special leave, but also by requiring the party seeking discovery to give security for costs (*post*, p. 745). This order provides that in any action where relief by way of damages or otherwise is sought on the ground of *fraud or breach of trust*, the plaintiff may at any time after delivering his statement of claim, and a defendant may at or after the time of delivering his defence, without any order for that purpose, and in every other cause or matter the plaintiff or defendant may by leave of the Court or a judge deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer. The power of administering interrogatories is, however, subject to the following important limitations:—

Interroga-  
tories.

1. That no party may deliver more than one set of interrogatories to the same party without leave; and 2. That interrogatories which do not relate to any matters in question in the cause or matter are to be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

In deciding upon any application for leave to exhibit interrogatories, the Court takes into account any offer which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them; and the exhibition of interrogatories unreasonably, vexatiously, or at improper length, is visited with the penalty of payment of all costs to

<sup>(1)</sup> R. S. C. O. xxxii., r. 6, and see on the subject of admissions Brett's *Leading Cases in Equity*, p. 296, *et seq.*

An affidavit of the solicitor or his clerk of the due signature of any admissions of documents or facts is sufficient evidence of such admissions.

A similar affidavit of the service of

any notice to produce, and of the time when it was served, with a copy of the notice to produce, is sufficient evidence of the service of the notice, and of the time when it was served.

A notice to produce documents is to be in the form specified in the Rules, Form No. 14, Appendix B, R. S. C. O. xxxii., rr. 7, 8.

Interrogatories.

to be paid in any event by the party in fault. In actions in the Queen's Bench the general rule is, in the absence of special circumstances, not to allow interrogatories or discovery until after defence. In the Chancery Division, on the other hand, the general rule is to order discovery before defence <sup>(1)</sup>.

It has been decided that a plaintiff cannot administer interrogatories in an action to enforce a penalty <sup>(2)</sup>.

An action for recovery of land is no exception to the general rule, that a party has a right of discovery from his opponent to support his own case <sup>(3)</sup>.

An action for discovery may still be brought without claiming any other relief. But it has been very recently decided that the Court will not entertain an action for discovery only in aid of proceedings in a foreign Court <sup>(4)</sup>.

In an action by a foreign potentate, government, or corporation the Court may stay proceedings pending the nomination of some proper person to give discovery <sup>(5)</sup>.

If any party to a cause or matter be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly <sup>(6)</sup>. This officer is regarded "as the *alter ego* of the corporation, inasmuch as the corporation itself cannot answer."

It has been decided on this rule that when a corporation puts forward one of their officers to answer interrogatories, who is also their solicitor, they cannot when so doing claim the advantage of the solicitor's privilege. "Having elected to answer through him they have waived the privileges which might otherwise have existed" <sup>(7)</sup>. An infant cannot be interrogated <sup>(8)</sup>.

<sup>(1)</sup> R. S. C. O. xxxi., rr. 1, 2, 3; *Mercier v. Cotton*, 1 Q. B. D. 442; *Harbord v. Monk*, 9 Ch. D. 616; *Union Bank v. Manby*, 13 Ch. D. 240; but see *Sachs v. Spielman*, 37 Ch. D. 303, where an application by the defendant for particulars was ordered to stand over until the defence was put in.

<sup>(2)</sup> *Hunnings v. Williamson*, 10 Q. B. D. 459; *Hobbs & Co. v. Hudson*, 25 Q. B. D. 232.

<sup>(3)</sup> *Lyell v. Kennedy*, 8 App. Cas. 217, and see *Ind. Coope & Co. v. Emmerson*, 12 App. Cas. 300; *Morris v. Edwards*, 23 Q. B. D. 287. See

as to collision action, *The Isle of Cyprus*, 15 P. D. 134.

<sup>(4)</sup> *Dreyfus v. Peruvian Guano Co.*, 41 Ch. D. 151.

<sup>(5)</sup> *Republic of Costa Rica v. Er-langer*, C. A. 1 Ch. D. 171.

<sup>(6)</sup> R. S. C. Order xxxi. r. 5. The officer or member has no right to his costs before answering: *Berkeley v. Standard Discount Co.*, 13 Ch. D. 95.

<sup>(7)</sup> *Mayor of Swansea v. Quirk*, 7 C. P. D. 106. See, on the other hand, *Corporation of Salford v. Lever*, 24 Q. B. D. 695.

<sup>(8)</sup> *Mayor v. Collins*, 24 Q. B. D. 361.

A new rule introduced in 1883 provides that in any action against or by a sheriff in respect of any matters connected with the execution of his office, the Court or a judge may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned <sup>(1)</sup>.

Interrogatories.

Any objection to answering any interrogatory on the ground of scandal, irrelevancy, or that it is not *bonâ fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer <sup>(2)</sup>.

And any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous <sup>(3)</sup>.

Interrogatories are answered by affidavit to be filed within ten days, or such other time as a judge may allow. This affidavit must, unless otherwise ordered by a judge, if exceeding ten folios, be printed, and be in a prescribed form.

Formerly "exceptions" were taken to answers. The rules now provide that exceptions shall not be taken to any affidavit in answer, but the sufficiency or otherwise of the affidavit shall be determined by the Court or a judge on motion or summons.

If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer, or answer further, either by affidavit or by *vivâ voce* examination, as the judge may direct <sup>(4)</sup>.

Allusion has already been made to the change in practice under which security for the costs of discovery is required. They are to be secured, in the first instance, by the party seeking the discovery, and only to be allowed as part of his costs when the discovery shall appear to the judge at the trial, or if there is no trial, to the Court, or to the taxing officer, to have been reasonably asked for. Any party seeking discovery by interrogatories must now before delivery of interrogatories, pay into court to a separate account in the action, to be called "Security for Costs Account," to abide further order, the sum

Security for costs.

<sup>(1)</sup> R. S. C. Order xxxi. r. 28.

<sup>(2)</sup> R. S. C. Order xxxi. r. 6. *Sammons v. Bailey*, 24 Q. B. D. 727.

<sup>(3)</sup> Nothing relevant to the issue can be deemed scandalous: *Fisher v.*

*Owen*, 8 Ch. D. 645; *Millington v. Loring*, 6 Q. B. D. 190.

<sup>(4)</sup> The application is by summons: *Chesterfield v. Black*, 13 Ch. D. 138, n.

of £5, and if the number of folios exceeds five, the further sum of 10s. for every additional folio. Any party seeking discovery otherwise than by interrogatories must, before making application for discovery, pay into court, to a like account, to abide further order, the sum of £5, and may be ordered further to pay into court as aforesaid such additional sum as the Court shall direct. The party seeking discovery must also, with his interrogatories or order for discovery, serve a copy of the receipt for the said payment into court, and the time for answering or making discovery commences from the date of such service. The party from whom discovery is sought cannot be required to answer or make discovery unless and until such payment has been made<sup>(1)</sup>. It has, however, been decided that only one sum of £5 need be paid into Court when the party delivers separate copies of the same interrogatories to various defendants, and that non-payment of the £5 does not entitle the person interrogated to an order to strike out interrogatories.

Unless the Court or a judge shall at or before the trial otherwise order, the amount standing to the credit of the "Security for Costs Account" in any cause or matter, will, after the cause or matter has been finally disposed of, be paid out to the party by whom the same was paid in on his request, or to his solicitor, on such party's written authority, in the event of the costs of the cause or matter being adjudged to him; but, in the event of the Court ordering him to pay the costs of the cause or matter, the amount in Court will be subject to a lien for the costs ordered to be paid to any other party.

Discovery  
and inspection.

(3.) The history of the old and cumbrous practice as to the discovery of documents, the war of affidavits, the preliminary flourishing of weapons before the real battle of the trial, is well told in a leading case in which the important principle was laid down that the Court will, as a general rule, watch with care and some jealousy any attempt to obtain discovery of documents by interrogatories<sup>(2)</sup>. The subject, which was dealt with to some extent by the Common Law Procedure Act,

(<sup>1</sup>) R. S. C. Order xxxi., rr. 25, 26, 27, where there are several defendants interrogated the deposit must be made in respect of each set of interrogatories: *Smith v. Read*, W. N. 1883, 196; but a single deposit is sufficient where one application is made against several co-plaintiffs:

*Campbell v. Poulett*, W. N. 1884, 48; *Eden v. Attenborough*, 23 Q. B. B. 130. See as to Court's discretion to dispense with deposit: *Newman v. London and South Western Railway Co.*, 24 Q. B. D. 454; 38 W. R. 348.

(<sup>2</sup>) *Hall v. Truman*, 29 Ch. D. 307.

1852, and the former rules under the Judicature Act, has now, under the rules of 1883 <sup>(1)</sup>, been dealt with in the following manner:—

Any party may, without filing any affidavit, apply to the Court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in their or his discretion, be thought fit. The affidavit to be made in reply to this application must be in the prescribed form as near as circumstances will admit, and must specify the documents, if any, which the party objects to produce.

Discovery  
of docu-  
ments.

The practice with regard to allowing discovery of documents was much considered in a case which came before the Court of Appeal in 1887, when the principle was laid down that the effect of the present rules is only to give the Court a discretion to refuse discovery where there is no reasonable prospect of its being of use. "The Court," said Cotton, L.J., "ought not to be called upon to consider a mass of affidavits on the question whether a defendant is likely to have in his possession documents to the production of which the plaintiff is entitled. The mode in which the problem is to be solved is by looking at the pleadings which shew what questions have to be tried, and the nature of those questions will show whether there is good reason for coming to the conclusion that a production of documents cannot be expected to be of any use, and any other proceedings in the action, for instance evidence used on a former occasion, may be looked at" <sup>(2)</sup>.

The Court has also a further power at any time during the pendency of any cause or matter, to order the production by any party thereto upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

Production  
of docu-  
ments.

Documents referred to in the pleadings stand on a peculiar

<sup>(1)</sup> R. S. C., 1883, Order xxxi, r. 12; see Brett's Leading Cases in Equity, p. 290, *et seq.*

<sup>(2)</sup> *Downing v. Falmouth United Sewage Board*, 37 Ch. D. 234, 242.

Notice to  
produce,  
&c.

footing. The rules provide that every party to a cause or matter may at any time, by notice in writing, give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in the cause or matter, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with the notice; in which case the Court may allow the document to be put in evidence on such terms, as to costs and otherwise, as it thinks fit.

Where notice to inspect such documents is given, the party who receives it must within two or four days (according to circumstances), deliver a counter-notice stating a time, within three days, when the documents or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of banker's books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody. The notice must also state which (if any) of the documents he objects to produce, and on what ground, and is to be in the prescribed form <sup>(1)</sup>.

It must be borne in mind that when a party against whom an order to answer interrogatories for discovery is made does not comply with the order, the Court possesses stringent powers to enforce obedience.

The party so failing is not only liable to attachment, but the rules further provide <sup>(2)</sup> that he shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a judge for an order to that effect, and an order may be made accordingly <sup>(3)</sup>.

Privilege.

The interesting and difficult subject of "privilege," *i.e.*, the right under certain circumstances, not to make disclosure either in answer to interrogatories or as to documents, shall be

<sup>(1)</sup> The notice is to be in the Form No. 11, Appendix B, with such variations as circumstances may require.

<sup>(2)</sup> R. S. C., 1883, Order xxxi. r. 21.

<sup>(3)</sup> *Thomas v. Palin*, 21 Ch. D. 360; *Litchfield v. Jones*, 25 Ch. D. 64; *Farden v. Richter*, 23 Q. B. D. 124.

considered hereafter when we come to the subject of Evidence (*post*, p. 878).

The attention of the reader may, however, here be directed to a few recent and important cases.

It has been decided that in an action of libel against the proprietor of a newspaper, if the defendant admits the publication of the words complained of, the plaintiff is not entitled to interrogate the defendant as to the name of the writer of the words, unless the identity of such writer is a fact material to some issue raised in the case <sup>(1)</sup>.

In a case decided in 1890 it was held that in an action of libel against a newspaper, where the defendant takes upon himself the responsibility of defending the action, the plaintiff ought not to be allowed to interrogate as to the sources of the defendant's information, even though the only issue in the action is as to the amount of damages, and the object of the interrogatories is to increase the damages by shewing gross recklessness on the part of the defendant. It was decided in the same case that where the plaintiff asks how many copies of the newspaper containing the libel were issued to the public, the defendant cannot decline to give the number on the ground that it is inconvenient or even impossible to do so. The defendant is bound to give the best information he can, and he must consequently give the number approximately <sup>(2)</sup>.

Where in any cause or matter it appears to the Court that Issues. the issues of fact in dispute are not sufficiently defined, the parties may be directed to prepare issues, and such issues will, if the parties differ, be settled by the Court.

This rule may be illustrated by a case in which a variety of questions arose with regard to the commission of a nuisance. The case is doubly valuable as supplying the pleader with examples not only of that which he ought to follow, but also of that which he ought to avoid. The proposed issue (the form of which will be found in the report at p. 635) was in the opinion of the Court "too wide, too roving, and too speculative," to deserve the name of or to be directed as an issue <sup>(3)</sup>.

The issues as finally settled were in the following form:—

Let the following questions of fact be tried:—

(1) Whether the defendants have carried on their works at S. in such a manner as to occasion a nuisance to the plaintiffs?

<sup>(1)</sup> *Gibson v. Evans*, 23 Q. B. D. 384. *nessey v. Wright*, 36 W. R. 879.

<sup>(2)</sup> *Parnell v. Walter*, 24 Q. B. D. 441; 38 W. R. 270 (following *Hennessey v. Wright*, 36 W. R. 879). <sup>(3)</sup> *West v. White*, 4 Ch. D. 631, 636.

(2) Whether the new works of the defendants, now in course of erection, will cause a nuisance to the plaintiffs?

(3) Whether the nuisance, if any, to the plaintiffs, occasioned by the works of the defendants, existed in the same degree twenty years ago, or has been materially increased during the last twenty years?

(4) What, if any, damage has been occasioned to the plaintiffs, or any of them, by the nuisances, if any, committed by the defendants?



## CHAPTER VIII.

## TRIAL.

The law with regard to the locality of actions forms a singular and instructive chapter of the English law <sup>(1)</sup>. "During the earliest ages of our judicial history juries were selected for the very reasons which would now argue their unfitness, *videlicet*, their personal acquaintance with the parties and the merits of the cause; and few rules of law were enforced with greater strictness than those which required that the *venue visne* or *vicinetum*, in other words the neighbourhood whence the juries were to be summoned, should be also that in which the cause of action had arisen . . . . The parties were required to state the very *venue*—the very district, vill, or hundred, where the facts were alleged to have taken place." A striking illustration of the old system is afforded by the celebrated case of *Mostyn v. Fabrigas* as tried before Lord Mansfield in 1775 <sup>(2)</sup>, where the plaintiff in order to escape the technical rule as to *venue*, pleaded that the assault had been committed at Minorca (to wit) at London aforesaid in the parish of St. Mary-le-Bow, in the ward of Cheap.

Place of trial.

The rules now provide that there shall be no local *venue* for the trial of any action, except where otherwise provided by statute. Every action in every Division must, unless otherwise ordered, be tried in the county or place named on the statement of claim, or (where no statement of claim has been delivered or required) by a notice in writing to be served on the defendant, or his solicitor, within six days after appearance. Where no place is named, the place of trial is, in the absence of order to the contrary, the county of Middlesex <sup>(3)</sup>. The foregoing provision applies to actions in the Chancery Division, as the rules of October, 1884, provide that it shall apply, "notwithstanding that the action may have been assigned to any judge."

Present rule.

(1) Smith's Leading Cases, vol. i., in notes to *Mostyn v. Fabrigas*, reported Cowper, 161.

(2) *Peregina iudicia omnibus modis*

*submovemus* was the principle of the law in the reign of Henry I.

(3) R. S. C. 1883, O. xxxvi. r. 1, 1 a.

The plaintiff is not allowed to leave this point open, but must make up his mind at the latest at the time of delivering the statement of claim. If he omits to do so he cannot name it in an amended statement of claim, and if he has named a place of trial in his original statement of claim he cannot alter it by any subsequent amendment, except by leave of the Court <sup>(1)</sup>.

Trial by  
jury.

In certain cases specified in the rules, viz. in actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, either party, by giving notice in the specified manner, may have the action tried by a jury. It is, however, provided that causes or matters assigned by the Judicature Act to the Chancery Division (*ante*, p. 354), shall be tried by a judge without a jury, unless the Court otherwise orders <sup>(2)</sup>.

The Court may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the principal Act could, without any consent of parties, have been tried without a jury.

It may also direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the Court, be conveniently made with a jury.

In any other cause or matter, upon the application (within ten days after notice of trial has been given) of any party thereto, an order shall be made for a trial with a jury.

Unless a trial with a jury has been ordered, or either party has signified a desire to have such a trial, the mode of trial is by a judge without a jury: but the Court may at any time order "any cause, matter or issue to be tried" in the following four ways: (1) by a judge with a jury, or (2) by a judge sitting with assessors, or (3) by an official referee, or (4) by a special referee with or without assessors.

Either party when entitled to a jury may have a *special jury* on giving a proper notice to that effect.

The Court has also a general power, subject to the previous rules, to "order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the

<sup>(1)</sup> *Locke v. White*, 33 Ch. Div. 308, and see generally on the subject of venue: *Phillips v. Beale*, 26 Ch. D. 621; *Cardinall v. Cardinall*, 25 Ch.

D. 772; *Powell v. Cobb*, 29 Ch. D. 486.

<sup>(2)</sup> *Attorney-General v. Vyner*, 38 W. R. 194.

places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others."

The foregoing provisions form a concise code regulating the mode of trial in general, and in particular the right to a trial with a jury. Their general effect will be found discussed in the cases cited in the notes, to which the diligent student is respectfully referred <sup>(1)</sup>.

Notice of trial.

The general rule is that the trial of any question or issue of fact with a jury takes place before a single judge, but in special cases a trial by two or more judges may be ordered <sup>(2)</sup>.

When the issues of fact are ready notice of trial may be given by the plaintiff or other party in the position of plaintiff, with the reply (if any) whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial, but if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the Court may allow, give notice of trial, the defendant may either himself give notice of trial, or may apply to the Court to dismiss the action for want of prosecution; and on the hearing of the application, the Court may order the action to be dismissed accordingly, or may make such other order and on such terms as to the Court or judge may seem just. When no reply is delivered, the six weeks do not begin to run until the three weeks' time to reply has expired <sup>(3)</sup>.

Ten days' notice of trial must ordinarily be given, unless short notice of trial, which is a four days' notice, has been agreed to by the parties or ordered by the Court <sup>(4)</sup>.

Notice of trial once given cannot be countermanded except by consent, or by leave of the Court, and if the party giving notice of trial for London or Middlesex omits to enter the trial on the day or day after giving notice of trial, the other party may, unless the notice has been countermanded, enter the trial within four days.

In many actions in the Chancery Division, *e.g.*, actions for account, administration, redemption, and foreclosure of mortgages, partition, &c., the Court cannot give a final judgment

<sup>(1)</sup> *The Temple Bar*, 11 P. D. 6; *Coote v. Ingram*, 35 Ch. D. 117; *Timson v. Wilson*, 38 Ch. Div. 72; *Fennessey v. Rabbits*, 56 L. T. (N.S.) 138.

<sup>(2)</sup> Order xxxvi., r. 9. This is the equivalent of the old trial at bar. This method of procedure was employed in the second trial of the

celebrated *Tichborne Case*: see *Dixon v. Farrer*, 18 Q. B. D. 43.

<sup>(3)</sup> Order xxxvi., rr. 11, 12. *Litton v. L.*, 3 Ch. D. 794; *Evelyn v. E.*, 13 Ch. D. 138; *Crick v. Hewlett*, 27 Ch. D. 354; *Saunders v. Pawley*, 14 Q. B. D. 234.

<sup>(4)</sup> R. S. C., 1883, Order xxxvi., rr. 13, 19.

Accounts  
and in-  
quiries.

at the trial. The course then taken is to direct accounts and inquiries before the chief clerk, and to adjourn the further consideration of the action until such accounts and inquiries have been taken and made. The result of the chief clerk's investigation is embodied in a certificate which is filed, and unless objected to becomes binding on the parties in eight days. In such a case the cause or matter may, after the expiration of eight days, and within fourteen days from the filing of the certificate, be set down for further consideration, on the written request of the solicitor for the plaintiff or party having the conduct of the proceedings, and after the expiration of such fourteen days on the written request of the solicitor for the plaintiff or for any other party. This is done upon production of the judgment or order adjourning further consideration, or an office copy thereof, and an office copy of the chief clerk's certificate or a memorandum of the date when the certificate was filed, endorsed on the request by the proper officer. The cause or matter when so set down will not be put into the paper for further consideration until ten days after it has been set down, and is marked in the cause book accordingly. Notice must be given to the other parties in the action at least six days before the day for which the case is so marked.

Delivery  
of papers.

It is the duty of the party entering the trial to deliver to the proper officer two copies of the whole of the pleadings, one of which is for the use of the judge, and it must be borne in mind that by a subsequent rule if a trial cannot conveniently proceed by reason of the solicitor having neglected to attend, or having omitted to deliver papers, the solicitor may be rendered personally liable to pay costs <sup>(1)</sup>.

Default in  
appearance.

Suppose now one of the parties makes default in appearance at the trial, the rule then is that if the defendant is in default, the plaintiff may prove his claim, so far as the burden of proof lies upon him.

If, on the other hand, the plaintiff makes default in appearance, the defendant, if he has no counter-claim, is entitled to judgment dismissing the action, but if he has a counter-claim, then he may prove such counter-claim so far as the burden of proof lies upon him.

Attention may be directed to a remarkable case which came

<sup>(1)</sup> R. S. C., 1883, Order xxxvi., r. 30; Order lxv., r. 5. The Court of Appeal has jurisdiction to hear a direct appeal from a judgment by default, but such an appeal will not be encouraged. The proper course

for a party against whom judgment has been given by default is to apply to the judge who heard the cause to set aside the judgment, and to rehear the cause: *Vint v. Hudspeth*, 29 Ch. D. 322.

before the Court of Appeal in 1878, with regard to default of appearance in a "test action." Seventy-eight actions for alleged fraudulent representations, all of which raised substantially the same question, had been brought by different plaintiffs against the same defendant. It would of course, as was pointed out by Sir George Jessel, have been a scandal to the administration of justice if all these actions had been allowed to proceed, and it was agreed that one action should be made a test action, the result of which was to bind all the plaintiffs, but not to bind the defendant. When the test action came on, the plaintiff, to borrow the language of the judge of first instance, thought fit ignominiously to retreat from the contest. For our purpose it will suffice to say simply that he made default in appearance. The Court of Appeal decided that, though the order contained no express provision to that effect, the Court had power to substitute another of the actions as the test action, and that, as the trial of the original test action had failed to be a real trial of the issue between the plaintiffs and the defendant without any fault of the other plaintiffs, this substitution ought to be made<sup>(1)</sup>. The judges of the Court of Appeal, in delivering judgment, said: "It was called a test action, and although the order speaks of a judgment, what was intended was that there should be a fair trial of the question which should decide everything between the parties . . . Now the judge must decide what is a fair trial, whether there really has been a test action tried, and if he is satisfied that there has not been (and how he could come to any other conclusion on the facts of this case it is difficult to understand), surely he must have jurisdiction to modify his former order, which was intended to prevent the scandal and injustice and waste of time and money, which would have been caused by trying the same question seventy-eight times over, so as to secure that which justice demands, viz., that there should be one fair trial of the issues between the parties.

"The judge must have the power to control the proceedings before him so as to do justice to the parties. The order assumes, although it is not very carefully worded, that there will be a decision of the rights of the plaintiffs in *Robinson v. Chadwick* as against the defendants in that action, and if from any accident there is no trial of the right of the plaintiffs against the defendants in that action, it cannot be such a trial as was contemplated when the order was made."

To prevent injustice in cases where one of the parties, &c.,

(1) *Amos v. Chadwick*, 9 Ch. D. 459, 463.

makes default, the rules provide that any verdict or judgment obtained in default of appearance, may be set aside by the Court upon such terms as may seem fit, upon an application made within six days after the trial <sup>(1)</sup>.

The judge has also a power "if he think it expedient for the interest of justice," to postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit <sup>(2)</sup>.

Address to  
jury.

The rule as to speeches of counsel varies according to the circumstance whether the trial is with a jury or not. Upon a trial with a jury, the addresses to the jury are regulated as follows: The party who begins, or his counsel, is allowed at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence, and the opposite party, or his counsel, is allowed to open his case, and also to sum up the evidence, if any. The rules provide that the right to reply shall be the same as heretofore, viz., the plaintiff has the right to reply if the defendant calls evidence, but if not he has no such right, and must be content with the second speech summing up the evidence, leaving the last word with the defendant.

A trial is sometimes put an end to by the withdrawal of a juror <sup>(3)</sup>. (See as to new trial, *post*, p. 875).

Trial in  
the  
Chancery  
Division.

On a trial in the Chancery Division with witnesses, the practice is as follows: The leading counsel for the plaintiff opens his case. The plaintiff's evidence is then put in, and the junior counsel sums up. If the plaintiff has shewn a *prima facie* case, the defendant's leading counsel then opens his case; the defendant's evidence is put in, and his junior counsel sums up. If necessary, the plaintiff's leading counsel replies <sup>(4)</sup>.

In a case decided in 1876 it was laid down that the High Court of Justice had no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of court, or where a public trial would defeat the

<sup>(1)</sup> The party applying will usually have to pay the costs incurred: *Cockle v. Joyce*, 7 Ch. D. 56.

<sup>(2)</sup> Costs occasioned by adjournment must generally be paid by the party applying for the indulgence: *Lydall v. Martinson*, 5 Ch. D. 780.

<sup>(3)</sup> See as to the effect of withdrawal of a juror: *Thomas v. Exeter Flying Post Co., Ltd.*, 18 Q. B. D. 822.

<sup>(4)</sup> *Kino v. Rudkin*, 6 Ch. D. 163. The reason of this rule is there stated

as follows: The trial of an action in the Chancery Division is not like a trial at *Nisi Prius*, it embodies two proceedings, the trial of the action, and a motion for judgment.

It is the duty of the junior counsel to take notes of the judgment, so that in the event of an appeal, he may be able to inform the Court of Appeal of the ground on which the judgment was based, and costs will be refused, unless this is done.

object of the action, as was suggested in *Andrew v. Raeburn* <sup>(1)</sup>, or those cases where the practice of the old Ecclesiastical Courts in this respect is continued <sup>(2)</sup>.

With regard to the entry of judgment, three courses are open to the judge. He may, at or after the trial: (1) direct that judgment be entered for any or either party; or (2) adjourn the case for further consideration; or (3) leave any party to move for judgment. The Supreme Court of Judicature Act, 1890 <sup>(3)</sup>, now provides that every motion for judgment in any cause or matter in which there has been a trial thereof, or any issue therein, with a jury, shall be heard and determined by the judge before whom such trial with a jury took place, *and not by a Divisional Court*, unless it be impossible or inconvenient that such judge should act, in which case such motion shall be heard and determined by some other judge to be nominated by the President of the Division to which the cause or matter belongs. No judgment may be entered after a trial without the order of a Court or judge <sup>(4)</sup>.

Entry of judgment.

As many a case must necessarily come before the Courts in which the great *desideratum* for a proper decision of the point of controversy is a practical knowledge of some technical or scientific subject, an accurate acquaintance with the usages of a particular trade or business, or a minute investigation of books by some one familiar with the intricacies of accounts, elaborate provision is made by the rules for dealing with cases of this description by enabling the trial to be held with assessors, or empowering the judge to refer matters for the decision of commissioners or official referees <sup>(5)</sup>.

The mode in which evidence is given at a trial will be more appropriately considered when we come to treat of the subject of Evidence. For the present it will suffice to point out that evidence may be given either orally, *i.e. vivâ voce*, or in the form of affidavit, which may be described as a written statement on oath <sup>(6)</sup>. Evidence may be given by affidavit (*a*) where there has been a formal agreement in writing between the solicitors of all parties; (*b*) by order of the Court; (*c*) on motions, petitions, and summonses (*post*, p. 766); (*d*) in certain cases in Admiralty actions, (R. S. C., 1883, O. xxxvii., r. 2).

<sup>(1)</sup> Law Rep. 9 Ch. Ap. 522.

<sup>(2)</sup> *Nagle-Gillman v. Christopher*, 4 Ch. D. 173; and see *Mellor v. Thompson*, 31 Ch. D. 55, where, as the plaintiff stated that a public hearing would defeat the end of the action, and render success on the appeal useless to him, the order was made *in invitum*.

<sup>(3)</sup> 53 & 54 Vict. c. 44, s. 2.

<sup>(4)</sup> R. S. C. Order xxxvi., r. 39.

<sup>(5)</sup> R. S. C. Order xxxvi., r. 43 *et seq.* Light and air cases in the Chancery Division are now not unfrequently referred.

<sup>(6)</sup> See as to form of affidavits, R. S. C., 1883, Order xxxviii., r. 7 *et seq.*

## CHAPTER IX.

## JUDGMENTS.

Difference  
between  
judgment  
in Chan-  
cery Divi-  
sion and  
Queen's  
Bench  
Division.

The attention of the reader may here be directed to the marked contrast which often exists between a judgment in the Chancery Division and a judgment in the Queen's Bench Division, a distinction arising from the different natures of the businesses with which the Divisions respectively deal.

In the Chancery Division, as already pointed out, it is extremely usual for the judge at the trial, or on the motion for judgment, *ex gr.*, in actions for administration, foreclosure, or redemption of mortgages, or for partition, to direct accounts and inquiries which are worked out in Chambers and the result embodied in a chief clerk's certificate. When this has been done, the action comes on again on further consideration, when the judge makes an order finally determining the respective rights of the parties to the litigation. In actions in the Queen's Bench Division, on the other hand, the trial and verdict end the matter, and the successful party proceeds to execution, though, as above mentioned, here, too, the judge has power in a proper case to refer the matter to an official or special referee, or obtain any necessary scientific or expert assistance.

Moreover, it frequently happens, that when the parties are face to face before the judge they agree, though sometimes not without a certain element of judicial pressure, to refer their differences to arbitration, if the matter be one which cannot be conveniently investigated in the usual way. It will be convenient for us therefore here to notice the present law as to arbitrations and some of the usual proceedings which take place before or after judgment in an action, before we consider the various modes in which the judgment of the Court can be enforced <sup>(1)</sup>.

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(1) The following definitions may serve to illustrate the statements in the text:—

A judgment at common law in an action for money, irrespective of any statute, is nothing more than a

sentence of a Court of law, declaring the opinion of the Court that the plaintiff is entitled to recover a sum of money: *Edwards on Execution*.

A judgment is a sentence or order of the Court, pronounced on hearing



## ARBITRATION.

All matters in controversy between parties may be referred by them to arbitration. The parties may refer not only existing differences, but also any future matters of dispute. Reference,  
how made.

The reference to arbitration <sup>(1)</sup> (which is usually called the submission) may be verbal or in writing, under hand or under seal, or by an order of Court.

Any person may be appointed an arbitrator regardless of his capacity to deal with the matter in dispute. To quote an old illustration, two persons may agree to be bound by the opinion, on a point of law, of the gatekeeper of Lincoln's Inn. If, however, unknown to one or both of the parties, there is any bias or secret interest on the part of the arbitrator, he is unfit for the post, and his award is liable to be set aside.

An arbitrator is practically a judge between the parties, and he should conduct his enquiry upon the same laws and in the same judicial spirit as is observed by the ordinary legal tribunals.

The determination of an arbitrator or umpire is called an award <sup>(2)</sup>. The award is binding and conclusive upon the

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and understanding all the points in issue, and determining the right of all the parties to the cause or matter. It is either interlocutory or final. But the most usual ground for not making a perfect judgment in the first instance is the necessity which frequently exists to make inquiries, or to take accounts, or sell estates, and adjust other matters, which must be disposed of before a complete decision can be come to upon the subject-matter of the action: Daniell's Chancery Practice, vol. i. 6th ed. p. 785.

A verdict is the unanimous decision of the jury on the point or issue submitted to them. It is either *general* for the plaintiff or defendant, or *special*, stating all the facts of the case, and leaving it to the Court to pronounce the proper judgment. The final judgment is the sentence or order of the Court upon the cause or issues as appearing from the previous proceedings therein, and determining the rights of all the parties thereto: Hal. 141.

<sup>(1)</sup> The mere fact that a person has to determine a point in controversy between two persons does not

make him an arbitrator, within the statutes applicable to arbitrators. To give him that character his duties must involve the performance of judicial duties. Thus, a person appointed to determine between two persons the value of certain property is not an arbitrator: *Collins v. Collins*, 26 Beav. 306; *Boss v. Helsham*, L. R. 2 Ex. 72), unless his duties involve a judicial inquiry: *Re Hoppe*, L. R. 2 Q. B. 367.

Any person who can contract or sue in respect of particular matters may refer those matters to arbitration; see, as to executors and trustees, 44 & 45 Vict. c. 41, s. 37; as to trustees in bankruptcy, 46 & 47 Vict. c. 52, s. 57. Many Acts of Parliament relating to public undertakings, the Land Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the like provide for arbitrations whenever disputes arise in the course of carrying such Acts into force.

<sup>(2)</sup> See as to notice of motion to set aside award, *Re Gallop and Central Queensland Meat Export Co.*, 25 Q. B. D. 230.

parties unless steps are taken to set it aside or refer it back to the arbitrator <sup>(1)</sup>.

Arbitra-  
tion.

The early history of arbitration shews that agreements to refer were looked upon with disfavour, so far as they were relied upon, as taking away from either of the parties his ordinary right of redress in a Court of law. On the ground of public policy it is a rule of law that any agreement to "oust the Courts of their jurisdiction" is void, and applying this rule, it was held again and again that an agreement to refer was not sufficient to oust the jurisdiction of the Courts, and is no bar to an action for the same subject-matter <sup>(2)</sup>. Even the addition of a covenant not to sue in respect of the matter does not prevent the party from bringing his action <sup>(3)</sup>. To evade these authorities a plan was introduced of stipulating that no right of action should arise to either party until the matter in dispute had been referred to an arbitrator and determined by him <sup>(4)</sup>. The legislature finally interfered, and enabled the Courts in any case to stay proceedings which had been commenced contrary to an agreement to refer (17 & 18 Vict. c. 125, s. 11) <sup>(5)</sup>.

The tendency of modern legislation has been still further to favour the "domestic forum" of arbitration, and the several statutes relating to arbitration, extending from 9 & 10 Wm. 3, c. 15, to the present time, have been repealed, re-enacted, and extended in one Act, which received the Royal assent on the 26th of August, 1889, and came into operation on the 1st of January, 1890 <sup>(6)</sup>, the principal provisions of which we shall now proceed to consider.

The first twelve sections of the Act deal with references to arbitration by consent of the parties out of Court.

The first section enacts that a submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court; and a

<sup>(1)</sup> An award may be set aside or referred back on the following grounds, viz. :—(1) that it exceeds the submission; (2) that it does not extend to all the matters referred; (3) that it is uncertain; (4) that it is not final; or (5) that it is impossible, illegal, inconsistent, or unreasonable.

<sup>(2)</sup> *Thompson v. Charnock*, 8 T. R. 139.

<sup>(3)</sup> *Horton v. Saylor*, 4 H. & N. 643.

<sup>(4)</sup> *Scott v. Avery*, 5 H. L. Ca. 812; *Sharpe v. San Paulo Railway Co.*,

L. R. 8 Ch. 507; and see *Viney v. Bignold*, 20 Q. B. D. 572, where it was held an action could not be brought on a fire policy until the condition precedent of the determination by arbitration of the amount due had been fulfilled.

<sup>(5)</sup> *Willesford v. Watson*, L. R. 8 Ch. 480; *Law v. Garrett*, 8 Ch. D. 26; and see p. 130, *et seq.*, Annual Practice, 1890-91, as to Arbitration generally.

<sup>(6)</sup> 52 & 53 Vict. c. 49.

submission, unless a contrary intention is expressed therein, is to be deemed to include the provisions set forth in the first Schedule to the Act, so far as they are applicable to the reference under the submission <sup>(1)</sup>.

Arbi-  
tration  
Act, 1889.

The provisions in the first Schedule which are to be thus implied in all submissions, in the absence of provision to the contrary, are as follows:—

(a.) If no other mode of reference is provided, the reference shall be to a single arbitrator.

(b.) If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

(c.) The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

(d.) If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

(e.) The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

(f.) The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

(g.) The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation.

(h.) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

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(1) The Act does not apply to arbitrations then pending (sect. 25).

(i.) The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

Power to stay proceedings where there is a submission.

If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The Court has also power in certain cases to appoint an arbitrator, umpire, or third arbitrator. The Act provides that in any of the following cases—

- (a.) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator :
- (b.) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy :
- (c.) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him :
- (d.) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy :

Any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on applica-

tion by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties <sup>(1)</sup>.

Arbitration Act,  
1889.

The Act next deals with references under order of the Court, and enables the Court in any cause or matter other than a criminal proceeding by the Crown in certain cases to refer the whole matter, or any question to be tried before a special referee or arbitrator, or an official referee or *officer of the Court*, whose report, unless set aside by the Court, is to be equivalent to the verdict of a jury. The Act provides powers for summoning witnesses, &c., and for stating special cases for the opinion of the Court on questions of law. There is also a very important section as to costs, providing that any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

Among the other provisions of the Act <sup>(2)</sup> may be noticed one which renders false evidence before a referee, arbitrator, or umpire punishable as perjury in the same way as if the evidence had been given in open Court. Another section provides that the Act, except as is expressly mentioned, shall apply to the Crown, but also provides that nothing in this Act shall empower the Court or a judge to order any proceedings to which Her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent of Her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown <sup>(3)</sup>.

(1) 52 & 53 Vict. c. 49, s. 5. Sect. 6 enables the parties, unless the submission expresses a contrary intention, to supply vacancies, but any appointment made under this

section may be set aside by "the Court or a judge."

(2) 52 & 53 Vict. c. 49, s. 20.

(3) 52 & 53 Vict. c. 49, s. 23.

## CHAPTER X.

## INTERPLEADER.

Among the many intricacies which arise in the conduct of human affairs there occasionally emerges the peculiar complication that a man finds himself in the possession of money or goods wherein he himself has no interest, but to which claim is made by different persons who are bringing or likely to bring an action or actions against him. The remedy of the man so situated is to "interplead," but before the Judicature Acts the practice was different in equity and at law. Now all proceedings are governed by the rules contained in Order LVII. <sup>(1)</sup>.

Cases in  
which in-  
terpleader  
arises,

Relief by way of interpleader arises in two classes of case—

1. Where the person seeking relief, "the applicant," as he is styled in the rules, is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (called the claimants), making adverse claims thereto :

2. Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process issued <sup>(2)</sup>.

"The applicant" must satisfy the Court by affidavit or otherwise of three things—

1. That he claims no interest in the subject-matter in dispute, other than for charges or costs ;

2. That he does not collude with any of the claimants ;

3. That he is willing to pay or transfer the subject-matter into Court or to dispose of it as the Court may direct.

<sup>(1)</sup> See Judicature Act, 1873, s. 25, sub-s. 6, *ante*, p. 693.

<sup>(2)</sup> When a "stakeholder" expects to be sued he may apply before action by originating summons: see Annual Practice, R. S. C., Order LVII. r. 1; *Thompson v. Wright*, 13

Q. B. D. 632; *Reading v. School Board of London*, 16 Q. B. D. 686; and see as to the necessity of a solicitor obtaining special instructions: *James v. Ricknell*, 20 Q. B. D. 164.

A few of the principal rules on the subject of interpleader may now be briefly noticed.

Rules as  
to inter-  
pleader.

An applicant is not to be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another.

And when he is a defendant, he may apply for relief at any time after service of the writ of summons, and the Court has power to stay all further proceedings in the action.

The Court may, with the consent of both claimants, or at the request of any, if it seems desirable, having regard to the value of the subject-matter in dispute, decide the matter in a summary way, and in this case there is no appeal. The general rule is not to do so when the value is over £50.

The Court may, in or for the purposes of any interpleader proceedings, make all orders as to costs and all other matters as may be just and reasonable <sup>(1)</sup>.

A master or district registrar has in interpleader matters the same jurisdiction as a judge at chambers <sup>(2)</sup>.

The 17th section of the Judicature Act, 1884, enables the Court to transfer interpleader proceedings to a County Court in cases in which the amount or value of the matter in dispute does not exceed the sum of £500, if the Court is of opinion that the matter can be more conveniently tried and determined in a County Court than in the High Court <sup>(3)</sup>.

<sup>(1)</sup> *E.g.*, a receiver may be appointed: *Howell v. Dawson*, 13 Q. B. D. 67.

<sup>(2)</sup> Where a master summarily decides an interpleader matter under Order LVII., r. 8, and gives leave to appeal, a judge at chambers has jurisdiction to entertain such appeal by virtue of the provisions of Order LVII. r. 11: *Webb v. Shaw*, 16 Q. B. D. 658; see as to appeals from County Court, *Lumb v. Teal* 22 Q. B. D. 675. No appeal lies from decisions of Master to Court of Appeal on an interpleader summons, Order LVII. r. 8, but *semble*, there is an appeal to

the Judge at Chambers: *Bryant v. Reading*, 17 Q. B. D. 128; see also as to Interpleader *Usher v. Martin*, 24 Q. B. D. 272; *Robinson v. Jenkins*, 24 Q. B. D. 275; *De Rothschild v. Morrison*, 24 Q. B. D. 750.

<sup>(3)</sup> The County Court Rules, 1889, Order XXXIII., r. 9, provide that the claimant must lodge the order transferring the proceedings and other documents with the County Court registrar, and that if he be guilty of undue delay in so doing, the order may apply by summons to a master to discharge the order or bar the claimant.

## CHAPTER XI.

## MOTIONS, PETITIONS, &amp;c.

It frequently happens that it becomes necessary to apply to the Court during the progress of an action, and either before or after judgment has been pronounced. When this is the case the application is made by motion, petition, or summons.

**Motions.** A motion is an application, either by a party to the proceedings or his counsel, not founded upon any written statement addressed to the Court <sup>(1)</sup>.

**Motions of course.** Motions are either motions of course, of which no notice need be given, and which do not require to be mentioned in Court, as there can be no opposition to them; or special motions. As an instance of a motion of course may be mentioned a motion to make a foreclosure decree absolute; the counsel who makes it merely hands his brief to the registrar in Court, who initials it, and the order is then drawn up accordingly.

**Special motions.** A special motion is one which must be made in Court, and supported by proper evidence, and the Court may grant or refuse it, or, if it thinks fit, may adjourn the hearing of the application. Motions of this class are either made *ex parte* or on notice. An *ex parte* motion may be made at any time when the Court is sitting, but it is essential that all material facts should be mentioned to the Court, and if this is not done, any order that may have been made will be discharged with costs, whatever the merits. In the Chancery Division one day a week is set apart for hearing motions, in addition to the first and last days of the sittings, which are always motion days. In the Queen's Bench Division the motions are set down in a printed list, and are taken in the order in which they are set down. In the Chancery Division a different practice prevails; the motions are not set down at all. The Queen's counsel are entitled to audience in order of seniority before the members of the junior bar are heard, each Queen's counsel having the right of moving two opposed and any number of unopposed motions.

*Ex parte*  
motions.

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(1) Daniell's Chy. Pr., vol. ii. p. 1546; R. S. C. Order LII., rr. 1, 2, 3.



When all the Queen's counsel have had an opportunity of being heard, the judge calls on the members of the junior bar, in some Courts in order of seniority, in others commencing from the centre. Motions.

Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, must state in general terms the grounds of the application; and, where the motion is founded on evidence by affidavit, a copy of any affidavit intended to be used must be served with the notice of motion.

Unless the Court give special leave to the contrary there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion. In applications to answer the matters in an affidavit or to strike off the rolls, the notice of motion must be served not less than ten clear days before the time fixed by the notice for making the motion.

Where leave has been obtained to serve short notice of motion, the notice must show that such leave has been obtained <sup>(1)</sup>.

If the matter is of a pressing character, and the plaintiff is desirous of not waiting until the defendant has appeared, or the time for his appearance has expired, leave to serve notice of motion with the copy of the writ should be obtained on motion *ex parte*.

It not unfrequently happens that the parties agree to treat the hearing of a motion as the trial of the action, and in such a case the order made by the judge on the motion concludes the proceedings, though any such order is of course subject to appeal <sup>(2)</sup>.

A petition is a request in writing addressed to the High Court of Justice, or the Lord Chancellor, and showing some matter or cause on which the petitioner prays the direction or order of the Court. A petition, as was said in a recent case <sup>(3)</sup> is just as much a litigious proceeding as an action if there is jurisdiction to bring the parties before the Court on it. In this case a petition had been heard on its merits, and had been dismissed on the ground that the plaintiff had failed to make out his case, Petitions.

<sup>(1)</sup> *Dawson v. Beeson*, 22 Ch. D. 504.

<sup>(2)</sup> The opinion of the Taxing Masters was this year specially taken on a point of some importance. Suppose judgment is given dismissing an action with costs, does this include the costs of a motion by the plaintiff, which was adjourned or stood over

to the hearing, and was then not brought on?

The Court, in the case of *Gosnell v. Bishop*, 38 Ch. D. 385, adopted the practice, as embodied in a certificate signed by seven of the Taxing Masters and answered this question in the affirmative.

<sup>(3)</sup> *In re May*, 28 Ch. D. 516, 519.

**Petitions.** and the Court of Appeal decided that the plaintiff could not, on the subsequent discovery of fresh evidence in support of his title, present a fresh petition for the same object, unless he previously obtained the leave of the Court. "The doctrine of *res judicata*," said one of the judges, "is not a technical doctrine applicable only to records. It is a very substantial doctrine, and it is one of the most fundamental doctrines of all Courts, that there must be an end of litigation, and that the parties have no right of their own accord, after having tried a question between them and obtained a decision of the Court, to start that litigation over again on precisely the same questions" <sup>(1)</sup>. A petition is a "pleading" within the meaning of the Judicature Act <sup>(2)</sup>. Petitions may be presented either in an action or in a matter over which the Court or a judge thereof has jurisdiction under some Act of Parliament or other special authority. (See as to Statutory Jurisdiction (*ante*, p. 690). Petitions are either for orders of course or for special orders; as an instance of the former class may be mentioned a petition to revive a suit which has abated on which the order is made as a matter of course. A special petition must be presented to the Court and supported by proper evidence; the persons named as respondents may in a proper case oppose it, and when all parties have been heard the Court makes or refuses the order prayed for. Many of these petitions, however, are of a kind which cannot properly be opposed, *e.g.*, a petition for payment out of Court of a fund to which the petitioner has become absolutely entitled. All that the petitioner has to do in such a case is to state shortly in his petition the facts which show how the fund came into Court, and that he has now become entitled to it; and on being satisfied that these facts are proved by proper affidavits the Court makes the order. In former times a great many orders were made on petition, which under the present practice are made on summons (see *post*, p. 782). The principal kinds of petitions now in use are petitions to wind up companies under the Companies Acts or petitions under the same Act for supervision orders (*ante*, p. 650); and petitions dealing with funds in Court where the sums to be dealt with are of large amount (see *post*, p. 782).

Special petitions are set down in the list in the order in which they are presented, and come on for hearing on the next petition day, one day a week being set apart for the purpose of hearing them; and the practice is to take all the unopposed petitions first, and then the opposed petitions.

<sup>(1)</sup> *In re May*, 28 Ch. D. 516.

<sup>(2)</sup> Judicature Act. 1873, s. 100.

Every petition, except a petition of course, and every copy thereof, must have a note appended to it, naming the person, if any, intended to be served, and if it is not intended to serve any one, the note must so state <sup>(1)</sup>.

In the absence of special leave, there must be at least two clear days between the service and the day appointed for hearing a petition.

It may be here desirable to mention that many Acts of Parliament require that the purchase-money of property taken under compulsory powers should be paid into Court, and the rules provide that in the case of applications under such Acts, any persons claiming to be entitled to the money so paid in must make an affidavit not only verifying their title, but also stating that they are not aware of any right in any other person, or of any claim made by any other person, to the sum claimed, or to any part thereof, or if the petitioners are aware of any such right or claim, they must in the affidavit "state or refer to and except the same" <sup>(2)</sup>.

The third form of proceeding to which we have alluded is by summons, and this shall be hereafter considered under the head of "Business at Chambers," *post*, p. 779.

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<sup>(1)</sup> R. S. C., 1883, Order LII., rr. 16,  
71.

<sup>(2)</sup> R. S. C. 1883, Order LII., r. 18.

## CHAPTER XII.

## EXECUTION.

After judgment the subject of execution must be considered. It deserves to be pointed out that the rules <sup>(1)</sup> provide that where any person is by a judgment or order directed to pay any money, or to deliver up or transfer any property, real or personal, to another, it shall not be necessary to make any demand thereof, but the person so directed shall be bound to obey such judgment or order, upon being duly served with the same without demand.

Where the judgment or order is to the effect that a party is entitled to relief upon a condition or subject to a contingency, the party so entitled may, upon the fulfilment of the condition or contingency and demand made upon the party against whom he is entitled to relief, apply to the Court or a judge for leave to issue execution <sup>(2)</sup>.

Definition.

Execution is the process by which a judgment or order of the Court is enforced against the person or property of the party against whom the order is made. In other words, it is the process by which a man obtains the "fruits" of a judgment or order which he has obtained against another person.

Various  
modes of  
execution.

The various modes of execution are a writ of *fieri facias*, commonly called a *fi. fa.*; a writ of *elegit*; sequestration; attachment of debts; charging orders; *distringas* and stop orders; a writ of possession, and a writ of delivery; all of which are aimed at the property of the party against whom the judgment or order is pronounced or made. In certain cases, execution may be had against the person of such party, and he is either attached or committed <sup>(3)</sup>.

A writ of execution, if unexecuted, remains in force for one year only from its issue; but may, at any time before its expiration, be renewed, by leave of the Court, for one year from the date of the renewal.

As between the original parties to a judgment or order,

<sup>(1)</sup> R. S. C., 1883.

*Robinson v. Galland*, 37 W. R. 898.

<sup>(2)</sup> *Bell v. Denvir*, 54 L. T. 729;

<sup>(3)</sup> *Callow v. Young*, 56 L. T. 147.

execution may issue at any time within six years from the recovery of the judgment or the date of the order; but leave to issue execution must be obtained in certain cases, viz.:

1. Where six years have elapsed since the judgment or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution; 2. Where a husband is entitled or liable to execution upon a judgment or order for or against a wife; 3. Where a party is entitled to execution upon a judgment of assets *in futuro*; 4. Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company; 5. Where the judgment as originally given was subject to a condition or contingency which has been fulfilled<sup>(1)</sup>.

Leave to  
issue execu-  
tion.

Every writ of execution must bear date of the day on which it is issued, be indorsed with the name and place of abode or office of business of the solicitor who actually sues it out, and of the solicitor (if any) or agent for another when he acts as agent, and the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered.

A judgment for payment of money or costs may be enforced by *fi. fa.* or *elegit*.

Enforce-  
ment of  
judgments.

A judgment for the payment of money *into Court* may be enforced<sup>(2)</sup> by writ of sequestration, by attachment, when authorized by law by the appointment of a receiver.<sup>(3)</sup>

A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession.

A judgment for the recovery of any property other than land or money may be enforced:

<sup>(1)</sup> R. S. C., 1883, O. XLII., rr. 23, 29; and see *Ex parte Woodall*, 13 Q. B. D. 479.

<sup>(2)</sup> The judgment of assets *in futuro* is signed against the personal representative of the deceased debtor on a plea of *plene administravit* by him. The material part of the form of judgment is as follows: "It is adjudged that the plaintiff do recover against the defendant the sum of £ , and £ for his costs of suit, to be levied of the goods and chattels which were of the said A.B. [the testator or intestate] the time of his death, and which shall hereafter come to the hands of

the defendant as executor [or administrator] to be administered:" Edwards on Execution, p. 26.

In cases where a company has no assets which can be reached by the ordinary writs of execution, but at the same time there is due to it from one or more of its shareholders an amount still unpaid on the share or shares he or they hold, a creditor of the company can proceed under this rule to obtain direct execution against the shareholder: Edwards on Execution, p. 27.

<sup>(3)</sup> *Coney v. Bennett*, 29 Ch. D. 993.

Enforce-  
ment of  
judgments,

- (a.) By writ for delivery of the property ;
- (b.) By writ of attachment ;
- (c.) By writ of sequestration.

A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal.

Allusion has already been made (*ante*, p. 708), to the fact that the Judicature Rules make special provision in proceedings by or against a partnership, when a judgment or order is obtained against a firm.

These provisions are as follows :—

Judgment  
against a  
partner-  
ship.

Where a judgment or order is against a firm, execution may issue :

- (a.) Against any property of the partnership ;
- (b.) Against any person who has appeared in his own name under Order XII., rule 15, *or* who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;
- (c.) Against any person who has been served, as a partner, with the writ of summons, and has failed to appear <sup>(1)</sup>.

If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do ; and the Court or judge may give such leave if the liability be not disputed, or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

Enforce-  
ment of  
judgments.

A judgment or order for the recovery or payment of a sum of money and costs may be enforced by one writ or separate writs of execution for the recovery of the sum and for the recovery of the costs. If a judgment or order is for payment at a certain time, no execution can be issued until the time has arrived.

It must be borne in mind that every *order* of the Court may be enforced against all persons bound by it in the same manner as a judgment <sup>(2)</sup>.

And any person not being a party to a cause or matter, who obtains any order or in whose favour any order is made, may enforce obedience to such order by the same process as if he were a party ; and any person not being a party to a cause or

<sup>(1)</sup> See *Munster v. Cox*, 10 App. Cas. 680, where the effect of the rule is considered.

<sup>(2)</sup> See as to this *Cremetti v. Crom*, 4 Q. B. D. 225.

matter, against whom obedience may be enforced, is liable to the same process as if he were a party to the cause or matter.

A party against whom judgment has been given may apply to the Court or a judge for a stay of execution or other relief upon the ground of facts which have arisen too late to be pleaded; and such relief may then be given as may be just. Stay of execution.

Suppose now a person against whom a judgment or order is made neglects or refuses to obey it, the Court has the following important powers to supply his omission:—

Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract, or other document, or to endorse any negotiable instrument, the Court may, on such terms and conditions (if any) as may be just, order that such conveyance, contract, or other document shall be executed, or that such negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose; and in such case the conveyance, contract, document, or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it. Enforcement of judgments.

If a mandamus, granted in an action or otherwise, or a mandatory order, injunction, or judgment for the specific performance of any contract be not complied with, the Court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or some other person appointed by the Court or judge, at the cost of the disobedient party, and upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a judge may direct, and execution may issue for the amount so ascertained, and costs <sup>(1)</sup>.

It has been judicially stated that a corporation has no soul to be damned or body to be kicked, but nevertheless it has no prerogative to set at naught the order of a Court of justice. Order XLII., rule 31, provides that "Any judgment or order against a corporation wilfully disobeyed may, by leave of the Court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property." Enforcement of judgment against corporation.

A judgment creditor may sometimes find himself in a difficulty

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(1) *Re Edwards*, 33 W. R. 578; *Mortimer v. Wilson*, 33 W. R. 927.

Discovery  
in aid of  
execution.

in enforcing his rights owing to his ignorance of the resources of the judgment debtor. A new and potent instrument is now placed at his command to assist him in this particular. Order XLII., rule 32, provides that when a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the Court or a judge for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, be orally examined, as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or an officer of the Court as the Court or judge shall appoint; and the Court or judge may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents.

And it has been judicially decided that this rule makes him to subject his adversary not only to an examination but to a cross-examination, and that of the severest kind <sup>(1)</sup>, and that the debtor is bound to answer all questions fairly pertinent and properly asked.

Things  
privileged  
from exe-  
cution.

The following things are privileged from being taken in execution under a *fi. fa.* :—

1. The wearing apparel, bedding, and implements of trade of any judgment debtor or his family, not exceeding £5 in value.

2. Goods of a stranger.

3. Goods *in custodia legis*, as in distress.

4. Fixtures affixed to the freehold.

In case of *elegit*—

5. Advowsons in gross.

6. Glebe lands.

The Bankruptcy Act <sup>(2)</sup> abolished the process of *elegit* as to personal chattels, which had been designated by the late Lord Justice James <sup>(3)</sup> as an “absurd anachronism,” by providing that the sheriff should not under a writ of *elegit* deliver the goods of a debtor, nor should a writ of *elegit* extend to goods.

It remains now to say a few words as to each of the particulars of execution which have been mentioned above.

The commonest of these is the writ of *fieri facias*, or *fi. fa.*, as it is usually called, which is a writ of execution directed to the sheriff commanding him that out of the goods and chattels of C. D. in his bailiwick he cause to be made the sum of £

<sup>(1)</sup> *Republic of Costa Rica v. Strousberg*, 16 Ch. D. 8.

<sup>(3)</sup> *Ex parte Abbott. Re Gourlay*, 15 Ch. Div. 456.

<sup>(2)</sup> Bankruptcy Act, 1883, s. 146.



and interest. Costs may also be included in the writ, or they may be made the subject of a separate process <sup>(1)</sup>.

The writ of *elegit* owes its origin to the Statute of Westminster the 2nd (13 Edw. 1, c. 18). Under this statute it was in the election of the judgment creditor (and hence the word *elegit*) that he should have a writ of *fi. fa.*, or that the sheriff should deliver to him all the chattels of the debtor, except his oxen and beasts of the plough, and one-half of his land until the debt should be levied. By 1 & 2 Vict. c. 110, s. 11, the whole land of the debtor was made liable. In this state the law continued down to 1883, when the Bankruptcy Act (46 & 47 Vict. c. 52, s. 146) provided that the sheriff should not under a writ of *elegit* seize the debtor's goods, and that such a writ should not extend to goods. A writ of *elegit* is the proper remedy whenever it is sought to have recourse to a legal estate in land for the satisfaction of a debt. "The sheriff does not give the creditor actual possession of the land itself, but the effect of his return is that it vests the legal estate in the creditor" <sup>(2)</sup>.

Writ of  
*elegit*.

Under the Judgment Acts the return of the sheriff to the writ creates a lien or charge on the land, and operates as a delivery in execution; and the creditor may then apply by petition to the Chancery Division for a sale of the debtor's interest in the land seized. If, however, the debtor's interest is of such a nature, *e.g.*, from being purely equitable—that it cannot be "actually delivered in execution" (as required by the Judgment Act, 1864 (27 & 28 Vict. c. 112)), and consequently cannot be sold, the creditor's course is to apply for the appointment of a receiver, which is called obtaining "equitable execution," and is tantamount to an actual delivery in execution within the meaning of the above Act <sup>(3)</sup>.

Petition for  
sale.

Equitable  
execution.

With regard to the remedy by sequestration, the rules provide that when any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof,

Sequestra-  
tion.

<sup>(1)</sup> See form of writ of *fi. fa.*: Appendix H., 1, 2, R. S. C., 1883, and as to the property available under it, the writs in aid of it and the sheriff's duties and rights: see Edwards on Execution, p. 112 *et seq.*

<sup>(2)</sup> Per Mellish, L.J., *Hatton v. Haywood*, 9 Ch. Ap. 236; Edwards on Execution, p. 164.

<sup>(3)</sup> See 1 & 2 Vict. c. 110; 23 & 24 Vict. c. 38; 27 & 28 Vict. c. 112;

*Hatton v. Haywood*, 9 Ch. Ap. 229; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Smith v. Cowell*, 6 Q. B. D. 625; *Ex parte Evans*, 13 Ch. D. 252; *Salt v. Cooper*, 16 Ch. D. 544; *Re Shepherd*, 43 Ch. D. 131; *Re Cooper*, 37 W. R. 330; *Atkins v. Shepherd*, 43 Ch. D. 131; and see Brett's Leading Cases in Equity, p. 280, *et seq.*

Sequestration.

the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration, the rules go on to say, "shall have the same effect as a writ of sequestration in Chancery had before the commencement of the principal Act, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration were before the same date dealt with by the Court of Chancery." The effect of the writ (by reference to the law in the Court of Chancery with regard to which we are thus thrown back) was that the commissioners appointed under it by the Court enter on the debtor's real estate and receive the rents and profits and sequesters his personal property until the judgment is satisfied <sup>(1)</sup>.

No sequestration to enforce payment of costs can however be issued without the leave of the Court.

Garnishee order.

The next mode of enforcing execution is by what is called a garnishee order, which is an order under which debts "owing or accruing" due from third persons, called the "garnishees," to the judgment debtor are directed to be paid to the judgment creditor. The order is obtained upon an *ex parte* application, supported by an affidavit made either by the creditor or his solicitor shewing that judgment has been recovered and is still unsatisfied, and the debtor may be previously examined orally as to what debts are owing to him.

It must be borne in mind that only *debts* can be attached by the garnishee process. The debt attached must be a debt owing by the garnishee—a debt of which the judgment debtor could have compelled payment, if he had desired to do so, and the payment of which can be effectually enforced <sup>(2)</sup>. Only such property of the debtor can be attached as the debtor could deal with properly, and without violation of the rights of other persons <sup>(3)</sup>.

Charging order.

If the debtor's property consists of money in the funds, or

<sup>(1)</sup> R. S. C., 1883, Order XLIII., r. 6; see further Daniell's Chancery Practice, p. 908, *et seq.*; Seton on Decrees, p. 157, *et seq.*; and see as to order for sale dispensing with inquiries *Re Bithray*, 38 W. R. 60, and cases there cited. See *Pratt v. Inman*, 43 Ch. D. 175; *Cook v. Cook*, 15 P. D. 116.

<sup>(2)</sup> R. S. C., 1883, Order XLV., and see cases collected in the Annual

Practice, and, in particular, *Hamer v. Giles*, 11 Ch. D. 942; *Chatterton v. Watney*, 16 Ch. D. 383; *Rogers v. Whiteley*, 23 Q. B. D. 236; and see *Prout v. Gregory*, 24 Q. B. D. 281; *Re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99; *Holtby v. Hodgson*, 24 Q. B. D. 103; *Davis v. Freethy*, 24 Q. B. D. 519.

<sup>(3)</sup> *Badeley v. Consolidated Bank*, 38 Ch. D. 238.

stocks, or shares, the only mode in which it can be reached by the execution creditor is by means of a charging order under 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82. The order may be made by any Divisional Court or any judge <sup>(1)</sup>.

In connection with the subject of charging orders we may briefly notice the process of *distringas* and stop orders. The writ of *distringas* is now abolished, but the same effect is produced by a person interested in stock standing in the books of any company serving a notice on the company, supported by an affidavit, setting forth the facts. The effect is that the fund cannot be dealt with unless information be given to the person serving the notice <sup>(2)</sup>. *Distringas.*

A stop order is a somewhat analogous process, applicable when the fund is in Court. Stop order.

The rules provide that when any moneys or securities are in Court to the general credit of any cause or matter, or to the account of any class of persons, and an order is made to prevent the transfer or payment of such moneys or securities, or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such moneys or securities, the person by whom any such order shall be obtained on the shares of such moneys or securities affected by such order shall be liable, at the discretion of the Court or a judge, to pay any costs, charges, and expenses which, by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter, or any persons interested in any such moneys or securities <sup>(3)</sup>.

A writ of possession is employed to enforce a judgment or order "that a party do recover possession of land," and directs the sheriff to enter, and without delay cause the judgment creditor to have possession of the lands and premises with their appurtenances <sup>(4)</sup>. Writ of possession.

A writ of delivery is used to enforce the recovery of any property other than land or money, and empowers the Court to insist on the defendant delivering up the specific thing itself, without the option of paying its value <sup>(5)</sup>. Writ of delivery.

<sup>(1)</sup> R. S. C., 1883, Order XLVI., r. 1; *Re Onslow*, 20 Eq. 677; *Widgery v. Tepper*, 6 Ch. D. 364; *Bag-nall v. Carlton*, 6 Ch. D. 130; *South Western Loan and Discount v. Robert-son*, 8 Q. B. D. 17; *Leggott v. Western*, 12 Q. B. D. 287.

<sup>(2)</sup> R. S. C., 1883, Order XLVI., rr. 2, 11; *Re Blaksley*, 23 Ch. D. 549.

<sup>(3)</sup> R. S. C., 1883, Order XLVI.,

r. 12, see as to stop order: *Palmer v. Locke*, 18 Ch. D. 381; *Pinnock v. Bailey*, 23 Ch. D. 497; *Mutual Life Assurance Society v. Langley*, 32 Ch. D. 460. The order is made on summons.

<sup>(4)</sup> R. S. C., Order XLVII.; *Knight v. Clarke*, 15 Q. B. D. 294.

<sup>(5)</sup> R. S. C., Order XLVIII., see *Ex parte Scarth*, L. R. 10 Ch. Ap. 234.

Attach-  
ment and  
committal.

Passing on now from remedies against the property to remedies against the person, we come to attachment and committal. The distinction between these two is now practically abolished <sup>(1)</sup>, though the writ of attachment still issues to the sheriff, while the order for committal is executed by the tip-staff of the Court. Moreover, a person committed by the Court is unable to be bailed out; but under a writ of attachment the sheriff may accept bail. A motion to release a prisoner from committal being in favour of the liberty of the subject is entitled to precedence over all other business <sup>(2)</sup>.

No writ of attachment can be issued without the leave of the Court or a judge, to be applied for on notice to the party against whom the attachment is to be issued. It is important to observe that any notice of attachment must state in general terms the grounds of the application, and that when the notice is founded on evidence by affidavit, a copy of any affidavit intended to be issued must be served with the notice of motion <sup>(3)</sup>.

An attachment for contempt is a criminal and not a civil process <sup>(4)</sup>, and the officer charged with its execution may break open the outer door of the house of the person sought to be attached in order to execute process <sup>(5)</sup>. The maxim of the law laid down in *Semayne's Case* that a man's house is his castle is subject to an exception, which was stated as follows: "When attachment is mere process, privilege exists; when it is punitive or disciplinary, privilege does not exist."

<sup>(1)</sup> See Odgers on Libel and Slander, 2nd ed. p. 499; *Buist v. Bridge*, 43 L. T. 432.

<sup>(2)</sup> *Ashton v. Shorrocks*, 29 W. R. 117.

<sup>(3)</sup> R. S. C., 1883, Order XLIV., r. 2; Order LII., r. 4; *Litchfield v. Jones*, 25 Ch. D. 64; *Hampden v. Wallis*, 26 Ch. D. 746; *Treherne v. Dale*, 27 Ch. D. 66; *Petty v. Daniel*,

34 Ch. D. 172.

<sup>(4)</sup> *Re Freston*, 11 Q. B. D. 545; *Re Dudley*, 12 Q. B. D. 44; *Re Strong*, 32 Ch. D. 342.

<sup>(5)</sup> *Harvey v. Harvey*, 26 Ch. D. 644, where the authorities are reviewed; *Reg. v. County Court Judge of Lambeth and Jonas*, 36 W. R. 475; and see notes to *Semayne's Case*, Smith's Leading Cases, vol. i.

## CHAPTER XIII.

## BUSINESS AT CHAMBERS.

Many and important are the classes of business which are delegated to the officials at chambers. In some cases applications have to be made to a master or chief clerk in chambers arising out of or connected with proceedings previously commenced by writ or petition or otherwise. In other cases the application originates in chambers, and is commenced by the issue of what is called an "originating summons."

Originating  
summons.

In all cases of applications originating in chambers, the summons must be prepared by the applicant or his solicitor. The summons is then sealed in the Central Office, or in Admiralty actions in the Admiralty Registry, and when so sealed is said to be "issued." The person obtaining a summons must leave at the Central Office or Admiralty Registry, as the case may be, a copy thereof, which must be filed, and stamped in the manner required by law.

An originating summons is "an action" within the meaning of the Judicature Acts and Rules (1).

The parties served with the summons must before they are heard in chambers enter appearances in the central office and give notice thereof (2).

A master in the Queen's Bench Division, and a registrar in the Probate, Divorce and Admiralty Division may, with certain specified exceptions, transact all business and exercise all authority and jurisdiction which may be transacted or exercised by a judge at chambers (3).

Powers of  
masters  
and regis-  
trars.

(1) *Galland v. Burton*, 30 Ch. D. 231; *Re Vardon's Trusts*, 55 L. J. Ch. 259.

(2) Order LV., r. 22.

(3) The excepted business with which masters of the Queen's Bench Division and registrars of the Probate, Divorce and Admiralty Division, may not deal (R. S. C., 1883, Order LIV., r. 12), is as follows:—

(a) All matters relating to criminal proceedings or to the liberty of the subject:

(b) Granting leave for service out of the jurisdiction of a writ, or notice of a writ, of summons:

(c) The removal of actions from one Division or judge to another Division or judge:

(d) The settlement of issues, except by consent:

(e) Inspection and other orders under Order L. rules 1 to 5.

(f) Appeals from district registrars.

Judge in  
chambers.

All orders made in the chambers of the Chancery Division are considered to be made by the judge himself, and, consequently, the judge in chambers is always accessible to any of the parties engaged in proceedings there who wish to see him, and it is the invariable practice to give any party, suggesting that he wishes to see the judge personally, the opportunity of doing so directly.

Adjourn-  
ment to  
judge.

Of course, as was pointed out by Sir George Jessel, if a solicitor took an adjournment before the judge of every item in an account no business could be transacted. In theory there is a right to do this, but in practice it is found impossible that it should be done. The practice is to wait until the taking of the account is completed, and then to take an adjournment once for all to the judge <sup>(1)</sup>.

An adjournment to the judge will not be granted unless an application is made to the chief clerk at the time when the summons is heard by him, either for an adjournment or for time to consider whether an adjournment shall be asked for. Otherwise the order can only be altered by motion to the Court to discharge it <sup>(2)</sup>.

An adjournment from the chief clerk to the judge is not an appeal so as to subject the party who asked for the adjournment to costs if he fail <sup>(3)</sup>.

In the Chancery Division the business in chambers of the judges to whom chambers are attached is carried on in conjunction with their Court business <sup>(4)</sup>.

In any proceeding before the judge in chambers any party may, if he please, be represented by counsel.

Chief  
clerks.

In the Chancery Division a great part of the work in chambers is done by the chief clerks, of whom each Chancery judge (to whom chambers are attached) has three, in addition to

(g) Prohibitions:

(h) Injunctions and other orders under sub-sect. 8 of sect. 25 of the principal Act:

(i) Awarding of costs, other than the costs of or relating to any proceeding before a master, or registrar, and other than any costs which by these rules, or by the order of the Court or a judge, he is authorized to award:

(k) Reviewing taxation of costs:

(l) Orders *absolute* for charging stocks, funds, annuities, or share of dividends, or annual proceeds thereof:

(m) Acknowledgments of married women.

<sup>(1)</sup> Per Jessel, M.R., in *Upton v. Brown*, 20 Ch. D (C.A.) 731.

<sup>(2)</sup> W. N. (1884) 218.

<sup>(3)</sup> *Hayward v. Hayward*, Kay Ap. 31; *Upton v. Brown*, 20 Ch. D. 731; *Re Watts*, 22 Ch. D. 1, 5.

<sup>(4)</sup> There are at present four Judges of the Chancery Division to whom chambers are attached, viz.: Mr. Justice Chitty, Mr. Justice North, Mr. Justice Stirling, and Mr. Justice Kekewich; the fifth Chancery Judge, Mr. Justice Romer, sits in Court only, and has no chambers or staff of chief clerks attached to him.

three other clerks of inferior rank. All these clerks are under the control of the judge to whom they are attached; and they attend every day at the judge's chambers in the Royal Courts of Justice in the Strand for the performance of their duties.

Chief  
clerks.

The judges of the Chancery Division to whom chambers are attached have power, subject to the rules, to order what matters shall be heard and investigated by their chief clerks, either with or without their direction, during their progress; and what matters shall be heard and investigated by themselves. It must be borne in mind that the phrase "a judge sitting in chambers" only means that he is not sitting in open Court. A judge is sitting at the Royal Courts of Justice when he is sitting in any part of the building, whether in chambers or in open Court <sup>(1)</sup>.

Each chief clerk, for the purpose of any proceedings directed to be taken before him, has full power to issue advertisements, to summon parties and witnesses, to administer oaths, to require the production of documents, to take affidavits and acknowledgments, other than acknowledgments by married women, and when so directed by the judge to examine parties and witnesses either upon interrogatories or *vivâ voce*, as the judge shall direct.

Parties and witnesses summoned to attend before a chief clerk are bound to attend in pursuance of the summons, and liable to process of contempt in like manner as parties or witnesses are liable thereto in case of disobedience to any order of the Court, or in case of default in attendance, in pursuance of any order of the Court or of any writ of *subpœna ad testificandum*, and all persons swearing or affirming before any chief clerk are liable to all such penalties for perjury, as if the matters sworn or affirmed had been sworn and affirmed before any other person by law authorized to administer oaths, to take affidavits, and to receive affirmations.

The judge may direct any computation of interest, or the apportionment of any fund, to be certified by the chief clerk, and to be acted upon by the Paymaster-General or other person without further order; and he may obtain the assistance of accountants, merchants, engineers, actuaries, and other scientific persons the better to enable any matter at once to be determined, and he may act upon the certificate of any such person.

The powers of chief clerks are, however, very materially limited by one of the Rules of December, 1885, which as enlarged

(1) *Hartmont v. Fisher*, 8 Q. B. D. 82; *Petty v. Daniel*, 34 Ch. D. 172.

Matters  
to be dealt  
with by  
judge in  
person.

by the Rules of the Supreme Court, June, 1889, provides that no order appointing a new trustee or for general administration, or for the execution of a trust, or for accounts or inquiries concerning the property of a deceased person, or other property held upon any trust, or the parties entitled thereto, and no vesting or other order consequential on the appointment of new trustees, shall be made, except by the judge in person. The same order also provides that summonses, the "object of which is to obtain the opinion of the Court or a judge upon the *construction of a document* or any *question of law*, and all applications for the appointment of a provisional liquidator, and applications for substituted service and for service out of the jurisdiction, must be brought before *the judge in person*." It has, however, been decided that an application for leave to issue a writ of attachment may be made in chambers and subject to the rule that an order for attachment must be made by the judge in person may be dealt with by a chief clerk <sup>(1)</sup>.

Business at  
chambers  
in the  
Chancery  
Division.

The present Rules under the Judicature Acts provide that the business to be disposed of in chambers by judges of the Chancery Division shall consist of the following matters, in addition to the matters which under any other rule or by statute may be disposed of in chambers :

- (1) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where there has been a judgment or order declaring the rights, or where the title depends only upon proof of the identity or the birth, marriage, or death of any person :

The general rule deducible from the authorities on this subject is, that if the matter be complicated or difficult a party may apply by petition, but does so at his own risk <sup>(2)</sup>.

- (2) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where the cash does not exceed £1000, or the securities do not exceed £1000 nominal value <sup>(3)</sup> :
- (3) Applications for payment to any person of the dividend or interest on any securities standing to the credit of any cause or matter, whether to a separate account or otherwise :

<sup>(1)</sup> *Davis v. Galmoye*, 40 Ch. D. 355.

<sup>(2)</sup> *Re Rhodes*, 31 Ch. D. 499; *Re Brandram*, 25 Ch. D. 366; *Re Broadwood*, 55 L. J. Ch. 646; *Ex parte*

*Parson of St. Alphege*, 55 L. J. (N. S.) 314; *Re Mill's Estate*, 55 L. J. (N. S.) 405.

<sup>(3)</sup> *Re Evans*, 54 L. J. (N. S.) 527.



Business at  
chambers  
in the  
Chancery  
Division.

- (4) Applications under 36 Geo. 3, c. 52, s. 32 (the Legacy Duty Act), in all cases where the money or securities in Court do not exceed £1000. or £1000 nominal value :
  - (5) Applications under 10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74 (the Trustee Relief Acts), in all cases where the money or securities in Court do not exceed £1000 or £1000 nominal value (*see ante*, p. 693 <sup>(1)</sup>):
  - (6) Applications under 9 & 10 Vict. c. 20 (the Parliamentary Deposits Act), for investment, payment of dividends, and payment out of Court :
- It is to be observed that under this rule there is no limit of amount to £1000.
- (7) Applications for interim and permanent investment and for payment of dividends under the Lands Clauses Consolidation Act, 1845, and any other Act passed before the 14th of August, 1855, whereby the purchase-money of any property sold is directed to be paid into Court <sup>(2)</sup> :
  - (8) Applications under the Trustee Acts, 1850 and 1852, in all cases where a judgment or order has been given or made for the sale, conveyance, or transfer of any stock or of any hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the estate or interest therein <sup>(3)</sup> :
  - (9) Applications on behalf of infants under 1 Will. 4, c. 65, ss. 12, 16, and 17, where the infant is a ward of Court, or the administration of the estate of the infant, or the maintenance of the infant is under the direction of the Court <sup>(4)</sup> :
  - (10) Applications under 18 & 19 Vict. c. 43 for the settlement of any property of any infant on marriage <sup>(5)</sup> :
  - (11) Applications under the Copyhold Acts respecting any securities or money in Court. Notice of any such application is not to be given to the Copyhold Commissioners unless the judge shall so direct.
  - (12) Applications as to the guardianship and maintenance or advancement of infants (*see ante*, p. 608, *et seq.*) :

<sup>(1)</sup> *Ex parte Maidstone and Ashford Railway Co.*, 25 Ch. D. 168.

<sup>(2)</sup> *Ex parte Mayor of London*, 25 Ch. D. 385.

<sup>(3)</sup> *Re Tweeds*, 25 Ch. D. 529.

<sup>(4)</sup> Applications under this rule are

by ordinary summons as the matter is before the Court.

<sup>(5)</sup> Applications under this rule are by originating summons, unless the infant is a Ward of Court. *See ante*, p. 612.

Business at  
chambers  
in the  
Chancery  
Division.

- (13) Applications connected with the management of property :
- (14) Applications for or relating to the sale by auction or private contract of property, and as to the manner in which the sale is to be conducted, and for payment into Court and investment of the purchase-money <sup>(1)</sup> :
- (15) All applications under 6 & 7 Vict. c. 73 (not being applications for orders of course) for the taxation and delivery of bills of costs and for the delivery by any solicitor of deeds, documents, and papers <sup>(2)</sup> :
- (16) Applications for orders on the further consideration of any cause or matter where the order to be made is for the distribution of an insolvent estate, or for the distribution of the estate of an intestate, or for the distribution of a fund among creditors or debenture holders <sup>(3)</sup> :
- (17) Applications for time to plead, for leave to amend pleadings, for discovery and production of documents, and generally all applications relating to the conduct of any cause or matter <sup>(4)</sup> :
- (18) Such other matters as the judge may think fit to dispose of at chambers <sup>(5)</sup>.

What is the meaning of the sweeping words "such other matters as the judge may think fit"? It was contended in one case that their effect was that, under the general power so conferred, a judge might order payment out of Court of a sum of less than £1000, though it formed part of a fund which was originally over £1000, but the judge declined to adopt this view, saying that such an interpretation would justify the Court in abrogating all the previous sub-rules of the Order <sup>(6)</sup>.

<sup>(1)</sup> See as to mode of carrying out order for sale, &c., O. LI., r. 1A. With regard to orders for sale out of Court, three things are required:—1. That the reserved bid should be fixed by the chief clerk; 2. That the auctioneer's remuneration should be similarly fixed; 3. That the purchase-money should be paid directly into Court. The directions as to the auctioneer's remuneration as well as the reserved bid must be mentioned in the order. *Per* Kay, J., *Pitt v. White*, 57 L. J. (N.S.) 650.

<sup>(2)</sup> Applications under this rule are by originating summons.

<sup>(3)</sup> Applications under this rule

are by ordinary summons. When questions of difficulty arise, the further consideration may be in Court. See *Re Barber*, 31 Ch. D. 665.

<sup>(4)</sup> Applications under this rule are by ordinary summons.

<sup>(5)</sup> *Re Evan Evans*, 54 L. T. (N.S.) 527.

<sup>(6)</sup> The following is a Table of the various statutes other than those referred to under R. S. C., 1883, Order LV., r. 2, under which the Court has jurisdiction on originating summons, or proceedings in the nature of originating summons, taken from the valuable work on Originating Summons by Messrs. G. N. Marcy

A large portion of the business transacted in chambers consists of the administration of the estates of deceased persons and of trusts, whether created by deed or will. In no respect have the alterations made of late years in Chancery practice and procedure been more marked than in the rules as to the administration of the estates of deceased persons. The old rule was, that if any question arose in the administration, and sometimes even in the absence of any question, any person interested in the estate might file a bill to have it administered by the Court, and the costs of all parties were paid out of the estate. The decree was made almost as a matter of course, and the practice led to great abuses. Any person interested under a will who chose to make himself unpleasant might, as the phrase ran, "throw the estate into Chancery" and obtain a general administration decree. The result of this was that the whole accounts of the estate were taken from the death of the testator and elaborate inquiries as to payment of debts and other matters gone into, which often took years to work out and involved the most ruinous expense, while the benefit derived from them was infinitesimal. The judges made several attempts to check this vicious system by refusing costs out of the estate, or even in some cases ordering the plaintiff to pay them<sup>(1)</sup>. The following rules passed under the provisions of the Judicature Acts now form a sort of code on the subject of Administration.

Adminis-  
tration.

An originating summons returnable in the chambers of a judge of the Chancery Division may be taken out, as of course, by any of the following persons, viz.: "the executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, and any person

By whom  
originating  
summons  
may be  
taken out.

and J. Theodore Dodd, to which the reader is referred for further information. In addition to jurisdiction under the Vendor and Purchaser Act, s. 9, Conveyancing Act, 1881, ss. 5, 9, 39, 42, Settled Land Acts, and the Married Women's Property Act, 1882, the Court has jurisdiction under "miscellaneous statutes" for dealing with the following matters:—(1) Arbitration and Award; (2) Burial Acts; (3) Consolidated Fund (Permanent Charges Redemption) Acts; (4) County Courts Act, 1888; (5) Defence Acts, 1842, 1860, and 1864; (6) Forfeiture for Treason and Felony Abolition Act, 1870; (7) Improvement of Land Acts; (8) Inferior Courts, removal from; (9) Land Charges, Registration, and

Searches Act, 1888; (10) Land Registry Act, 1862; (11) Land Transfer Act, 1875; (12) Mortgage Debenture Acts, 1865, 1870; (13) Mortmain and Charitable Uses Act, 1888; (14) National Debt (Conversion) Act, 1888; (15) National Debt Redemption Act, 1889; (16) Newcastle Chapter Act, 1884; (17) Parochial Charities (City of London) Act, 1883; (18) Polehampton Estates Act, 1885; (19) Railway Companies Act, 1867; (20) Stannary Court Acts; (21) Trade Marks Acts, 1883 to 1888.

(1) See *Ex. gr. Croggan v. Allen*, 22 Ch. D. 101, following *Bartlett v. Wood*, 9 W. R. 817, and notes to *Re Blake* (29 Ch. D. 913), *Brett's Leading Cases in Equity*.

Originat-  
ing  
summons.

claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law or customary heir of a deceased person, or as *cestui que trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid," for such relief of the nature or kind following, as may by the summons be specified, and as the circumstances of the case may require (that is to say), the determination, *without an administration of the estate or trust*, of any of the following questions or matters:—

- (a) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or *cestui que trust* ;
- (b) The ascertainment of any class of creditors, legatees, devisees, next of kin, or others ;
- (c) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts ;
- (d) The payment into Court of any money in the hands of the executors or administrators or trustees ;
- (e) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees ;
- (f) The approval of any sale, purchase, compromise, or other transaction ;
- (g) The determination of any question arising in the administration of the estate or trust <sup>(1)</sup>.

The general principle is that the Court has jurisdiction under this rule to determine such questions only as could formerly have been determined under a judgment for the administration of an estate or the execution of a trust <sup>(2)</sup>.

Any of the persons named in the above rule may in like manner apply for and obtain an order for—

- (a) The administration of the personal estate of the deceased ;
- (b) The administration of the real estate of the deceased ;
- (c) The administration of the trust <sup>(3)</sup>.

<sup>(1)</sup> R. S. C. O. LV., r. 3. This last sub-rule, however, does not enable the Court to determine any question which could not under the old practice have been determined under a judgment for the administration of an estate or of a trust. *Re Davies*, 38 Ch. D. 210 ; *Re Royle*, 43 Ch. D. 18, and see as to jurisdiction on originating summons, *Re Giles*, 43 Ch. D.

391 ; *Re Hargreaves*, 43 Ch. D. 401.

<sup>(2)</sup> *Re Carlyon*, 55 L. J. Ch. D. 219.

<sup>(3)</sup> It is to be borne in mind that relief is often sought under several of the above-mentioned sections at the same times. The practice rules provide that the address and description of the applicant and of the next friend (if any) should, in all cases, be

No order will be made for a general administration unless it is impossible to proceed without one, and the rules expressly provide that it shall not be obligatory on the Court or a judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order. Even if the testator has himself directed that his estate shall be administered by the Court, this does not deprive the Court of its discretion in the matter; but weight will be given to such a direction in considering whether the order shall be made <sup>(1)</sup>.

Judge not bound to order administration.

The principle on which the Court proceeds as to parties is that all persons whose interests conflict, must be either before the Court or sufficiently represented. The rules prescribe precisely who are to be served in each case, but speaking generally the persons to be served with the summons in the first instance, are, when the plaintiffs are the executors, administrators, or trustees, the persons or some of the persons interested in the relief sought. Where the summons is taken out by other persons, then the executors, administrators, or trustees are to be made defendants.

Parties.

The application must be supported by such evidence as the Court may require, and all proper directions may be given for the trial of any questions arising thereout.

Evidence.

On the hearing of the summons the judge may pronounce such judgment as the nature of the case may require, and may give any special directions touching the carriage or execution of the judgment, or the service thereof upon persons not parties, as it may think just.

The issue of a summons under the above rule, does not interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought <sup>(2)</sup>.

It must also be borne in mind, that by a recent order all proceedings for redemption or foreclosure of mortgages (except where there are complicated questions, *e.g.*, as to the priorities of

stated in the summons, and if the applicant or the parties summoned apply or are summoned as trustees, or in a representative capacity, the fact should appear in the summons, and the rule (if any) under which the application is made should be stated therein.

<sup>(1)</sup> *Re Blake*, 29 Ch. D. 913; *Re Stocken, Jones v. Hawkins*, 38 Ch. D.

319.

<sup>(2)</sup> As to the effect of a judgment for administration on the powers of trustees, see *ante*, p. 530; generally speaking its effect is to prevent the powers from being exercised, except under the authority of the Court (*Minors v. Battison*, 1 App. Cas. 428; *Eastwood v. Clark, Re Gadd*, 23 Ch. D. 134).

incumbrances) may now be commenced by originating summons (see *ante*, p. 561), and that by a further rule applications to the Court for appointment of new trustees may also be made by summons (*ante*, p. 534 <sup>(1)</sup>).

Practice at  
chambers.

In all cases of proceedings in chambers under any judgment or order, the party prosecuting the proceedings must leave a copy of the judgment or order at the judge's chambers, and certify it to be a true copy of the judgment or order as passed and entered.

A note stating the names of the solicitors for all the parties, and shewing for which of the parties such solicitors are concerned, must be left at chambers with every judgment or order.

Every judgment or order directing accounts or inquiries to be taken or made must be brought into the judge's chambers by the party entitled to prosecute it within ten days after it shall have been passed and entered, and in default any other party to the cause or matter may bring it in, and will then have the prosecution of it unless the judge shall otherwise direct <sup>(2)</sup>.

Upon a copy of the judgment or order being left, a summons is issued to proceed with the accounts or inquiries directed, and upon the return of that summons the judge, if satisfied by proper evidence that all necessary parties have been served with notice of the judgment or order, gives directions (1) as to the manner in which each of the accounts and inquiries is to be prosecuted; (2) the evidence to be adduced in support; (3) the parties who are to attend on the several accounts and inquiries, and (4) the time within which each proceeding is to be taken. A day or days may be appointed for the further attendance of the parties, and all such directions may afterwards be varied, by addition or otherwise, as may be found necessary.

The course of proceeding in chambers is ordinarily the same as the course of proceeding in Court upon motions. Copies, abstracts, or extracts of or from accounts, deeds, or other documents and pedigrees, and concise statements must, if directed, be supplied for the use of the judge and his chief clerks, and where so directed, copies must be handed over to the other parties. But no copies may be made of deeds or documents where the originals can be brought in unless the judge shall otherwise direct <sup>(3)</sup>.

<sup>(1)</sup> R. S. C. Dec., 1885, r. 21 (5A); R. S. C., June, 1889 (3A), under which the Court may make vesting orders.

<sup>(2)</sup> R. S. C. 1883, O. LV., r. 32. Where no order is drawn up the Registrar's note must be produced.

<sup>(3)</sup> R. S. C. O. LV., rr. 33, 37. The judge has power to dispense with service of notice of the judgment or order on any party, or to order substituted service thereof.

At the time any summons is obtained, an entry is to be made in the "Summons Book." This entry contains: (1) the date on which the summons is issued; (2) the name of the cause or matter, and by what party, and (shortly) for what purpose such summons is obtained, and at what time it is returnable. "Summons Book."

Lists of matters appointed for each day are made out and affixed outside the doors of the chambers of the respective judges; and, subject to any special direction, such matters are heard in the order in which they appear in such lists.

An important power is conferred upon the judge to make what is called a "classification order." The rules provide that where, upon the hearing of the summons to proceed, or at any time during the prosecution of the judgment or order, it appears to the judge with respect to the whole or any portion of the proceedings, that the interests of the parties can be *classified*, he may require the parties constituting each or any class to be represented by the same solicitor, and may direct what parties may attend all or any part of the proceedings. Where the parties constituting any class cannot agree upon the solicitor to represent them, the judge may "nominate such solicitor for the purpose of the proceedings before him, and where any one of the parties constituting such class declines to authorize the solicitor so nominated to act for him, and insists upon being represented by a different solicitor, such party shall personally pay the costs of his own solicitor of and relating to the proceedings before the judge, with respect to which such nomination shall have been made, and all such further costs as shall be occasioned to any of the parties by his being represented by a different solicitor from the solicitor so to be nominated." <sup>(1)</sup> "Classification order."

Whenever in any proceedings before a judge in chambers the same solicitor is employed for two or more parties, such judge may at his discretion require that any of the said parties shall be represented before him by a distinct solicitor, and adjourn such proceedings until such party is so represented.

Any of the parties other than those who have been directed to attend may attend at their own expense, and upon paying the costs, if any, occasioned by such attendance, or, if they think fit, they may apply by summons for liberty to attend at the expense of the estate, or to have the conduct of the action either

(1) R. S. C., O. LV., r. 40. In a case where the parties could not agree between themselves with regard to the appointment of a solicitor to re-

present the class the Court appointed the official solicitor (*Docwra v. Faith*, W. N. 1884, 174, 232).

in addition to or in substitution for any of the parties who shall have been directed to attend <sup>(1)</sup>.

It has been very recently decided that an agreement for the compromise of an action cannot be set aside on summons, but that a fresh action must be brought for the purpose <sup>(2)</sup>.

Appeals from Chambers are, in the Chancery Division, to a Judge in Court; in the Queen's Bench Division, to a Divisional Court <sup>(3)</sup>.

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<sup>(1)</sup> The practice as to allowing the costs of parties attending in chambers was laid down by Jessel, M.R., in *Sharp v. Lush*, 10 Ch. D. 473, as follows: "As a rule, I give leave to one solicitor to attend on one side and one solicitor on the other. When the residuary legatees come in what I do is this; I let one solicitor take the

accounts for the residuary legatees on the one side, and one solicitor take the accounts for the executors on the other."

<sup>(2)</sup> *Emeris v. Woodward*, 43 Ch. D. 185.

<sup>(3)</sup> Judicature Act, 1873, s. 50, and see as to Divisional Court, ss. 40 & 41.



## CHAPTER XIV.

## TRANSFER AND CONSOLIDATION—INTERLOCUTORY ORDERS, &amp;c.

In the course of legal proceedings it may be necessary or Transfer.  
desirable to consolidate actions, or in some cases to transfer an  
action or matter from one division of the High Court to another,  
or it may be from one judge to another of the same division.  
This subject is dealt with by the 49th Order of the Rules of  
the Supreme Court, 1883, the first rule of which provides that  
causes or matters may be transferred from one division to  
another of the High Court, or from one judge to another of the  
Chancery Division, by an order of the Lord Chancellor, but no  
transfer can be made from or to any division without the consent  
of the president of the division.

With regard to consolidation it is provided that causes or Consolida-  
tion.  
matters pending in the same division may at any time be  
consolidated by an order of the Court.

It is a well-established rule of practice that multiplicity of  
proceedings should, as far as possible, be checked. The rules  
accordingly make special provisions dealing with cases where  
proceedings are pending by or against a company or against the  
personal representatives of a deceased person, when in the former  
case the company is ordered to be wound up, and when in the  
latter case an order for administration has been made. In such  
cases, the judge in whose Court such winding-up or administra-  
tion is pending has power, without any further consent, to order  
the transfer to himself of any cause or matter pending in any  
other Court or Division brought or continued by or against  
such company, or by or against the executors or administrators  
of the testator or intestate whose assets are being so adminis-  
tered, as the case may be <sup>(1)</sup>.

The Court has also a power to make interlocutory orders, *i.e.*, Interlocu-  
tory orders.  
orders during the progress of an action for the detention, pre-  
servation, or inspection of any property or thing the subject-  
matter of the dispute. It may also authorize inspection of

(1) Superseding the old rule con-  
sidered in *Madras Irrigation and*

*Canal Co.*, 16 Ch. D. 702.

property or any observation or experiments that may be necessary for the purpose of justice. In certain cases orders may be made for preservation, or interim custody, of the subject-matter of litigation.

Order for  
sale.

The Court has also power to make any order for the sale "of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once."

Under this rule an order was in one case made for sale of a horse<sup>(1)</sup> which was consuming its value in food, or in a colloquial phrase, "eating its head off" while an action on a warranty was pending.

Again, when a lien or charge only is claimed against specific property other than land, and the plaintiff's title is only disputed to that extent, the Court may order the amount so claimed to be paid into Court, and that then the property should be given up<sup>(2)</sup>.

Full provision is also made by the rules for sales of real and leasehold estate in the Chancery Division, the proceedings in which *e.g.* actions for administration, redemption and foreclosure of mortgages, partition, &c., frequently require property to be sold<sup>(3)</sup>. In the case of actions relating to mortgages the Court has now full powers conferred upon it by the Conveyancing Act, 1881, s. 25, for which the reader is referred to p. 570, *ante*.

Appoint-  
ment of  
receiver.

Another mode in which the Court commonly interferes to prevent loss or mischief or preserve the rights of parties and maintain the *status quo* pending the determination of the action, is by the appointment of a receiver.

A receiver is an indifferent person between the parties, appointed by the Court to receive the rents and profits of real estate, or to get in and collect personal estate or other things in question, pending the suit, where it does not seem reasonable to the Court that either party should do so; or where a party is incompetent to do so: as in the case of an infant. A receiver is bound to account for and pay what he receives or gets in, as the Court shall direct; and, to secure his doing so, he is commonly ordered to enter into a recognizance, with sureties, and when appointed, he is treated as virtually an officer and representative of the Court, and subject to its orders.

<sup>(1)</sup> *Bartholomew v. Freeman*, 3 3, 4.  
C. P. D. 316.

<sup>(3)</sup> R. S. C., 1883. Order L. rr. 1-13.

<sup>(2)</sup> R. S. C. 1883, Order L. rr. 1, 2,

Thus receivers are appointed in administration actions, in actions for the dissolution of partnership, against executors or trustees who have committed breaches of trust, or at the instance of a mortgagee. The application is made by motion or summons which must be supported by evidence. In the Queen's Bench Division the appointment is made by summons:

Appoint-  
ment of  
receiver.

A member of the firm of solicitors for the plaintiff will not be appointed <sup>(1)</sup>.

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(<sup>1</sup>) *Re Lloyd. Allen v. Lloyd*, 12 Ch. D. 447. See as to receiver, *Taylor v. Eckersley*, 2 Ch. D. 302; *Seagrim v. Tuck*, 18 Ch. D. 296; *Truman v. Redgrave*, 18 Ch. D. 547; *In re Llewellyn, Lane v. Lane*, 25

Ch. D. 66; *Tillett v. Nixon*, 25 Ch. D. 238; *Re Shepherd*, 43 Ch. D. 131, and see the cases collected in Brett's Leading Cases, p. 280, *et seq.*; and as to practice, see Annual Practice, 1890-1891, p. 780, *et seq.*

## CHAPTER XV.

## APPEALS.

The 4th section of the Judicature Act, 1873, provides that the Supreme Court "shall consist of two permanent divisions, one of which, under the name of 'Her Majesty's High Court of Justice,' shall have and exercise original jurisdiction, . . . and the other of which, under the name of 'Her Majesty's Court of Appeal,' shall have and exercise appellate jurisdiction with such original jurisdiction as may be incident to the determination of any appeal."

Final and  
interlocu-  
tory orders.

The rules on the subject deal with two classes of orders of the Court, viz., final orders which determine the rights of the parties, and orders which do not determine their rights. When any step is necessary to perfect a judgment or order it is not final but interlocutory, and any doubt as to what orders are final and what interlocutory is determined by the Court of Appeal<sup>(1)</sup>. No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. These periods are to be calculated, in the case of an appeal from an order in Chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application from the date of such refusal.

Security  
for costs.

Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal.

The reason why the time for appealing is different in cases where the application has been granted and cases where it was merely refused was stated by Sir George Jessel, as follows:—The Court proceeds upon the principle that in cases where

(1) *Re Stockton Co.*, 10 Ch. D. 1875, s. 12. *Blakey v. Latham*, 43 Ch. D. 23; *Onslow v. Commissioners of Inland Revenue*, 25 Q. B. D. 465.

the application is granted, the man is entitled to know exactly what he is appealing from, to see exactly what is the final form which the judgment or order by which he may be aggrieved takes. Where, on the other hand, the application is simply refused, the applicant knows exactly the fate of his application at once, and therefore the time only runs from the date when the order was made.

Time for  
appealing.

A further reason for limiting the time in this way is, that when an application is refused, the party who desires to appeal is the one who has made the application, and whose duty it would be to draw up the order. If his time to appeal were to run from the time of entering the order, this would put a premium on delay and he might delay the matter indefinitely <sup>(1)</sup>.

Appeals from orders or decisions in the winding-up of companies under the Companies Acts <sup>(2)</sup>, or in bankruptcy, or "in any other matter not being an action," must be brought within twenty-one days.

All appeals to the Court of Appeal are now by way of rehearing, and are brought by notice of motion in a summary way. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part.

Mode of  
appealing.

The notice of appeal is to be served upon all parties directly affected by the appeal, and upon those parties only <sup>(3)</sup>. The Court of Appeal has, however, the power of directing notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties.

Notice of  
appeal.

Any notice of appeal may be amended at any time as the Court of Appeal may think fit.

Notice of appeal from any judgment whether final or interlocutory, or from a final order, is a fourteen days' notice, and notice of appeal from any interlocutory order is a four days' notice.

<sup>(1)</sup> *Swindell v. Birmingham Syndicate*, 3 Ch. D. 133; *International Financial Society v. City of Moscow Gas Co.*, 7 Ch. D. 241.

<sup>(2)</sup> This applies to orders for winding-up as well as orders made in the

winding-up of companies: *Re National Funds Assurance Co.*, 4 Ch. D. 305, and see *Re Madras Co.*, 23 Ch. D. 248.

<sup>(3)</sup> See as to service on "third party," *Re Salmon. Priest v. Uppleby*, 42 Ch. D. 351.

Appeal in  
the nature  
of a re-  
hearing.

An appeal is in the nature of a re-hearing <sup>(1)</sup>. The Court of Appeal accordingly has power not merely to make any order which ought to have been made by the Court below, but also to make such further order as the case may require, *i.e.* to make such order or judgment as ought to be made at the time when the appeal comes before it. A very striking illustration of the powers of the Court in this respect is afforded in a case in which the law had been very materially altered in the period which intervened between the time of the original notice of the action and the time when the appeal came on for hearing. The plaintiff obtained judgment in July, 1881, to recover possession of Her Majesty's Theatre, Haymarket, under a proviso of re-entry for breach of a covenant to insure. The defendant appealed next month. A stay of proceedings had been granted and continued, so that the plaintiff never obtained possession. On the 1st January, 1882, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), came into operation. The appeal came on for hearing afterwards, and the Court of Appeal, under sect. 14 of that Act (see *ante*, p. 125), granted relief against the forfeiture. The rule, they said, was intended to enable the Court of Appeal to do complete justice, and if the law was altered, to make such order as the case required according to the law existing when the matter came before them.

So sweeping is the authority conferred upon the Court of Appeal of giving the judgment and making the order which ought to have been made by the Court below that all its powers may be exercised, "notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision." The Court has also power to make such order as to the whole or any part of the costs of the appeal as may be just.

Further  
evidence  
on appeal.

An appellant who wishes to produce further evidence on an appeal should give to the other side notice of his intention to apply at the hearing for leave to produce such evidence <sup>(2)</sup>.

The general rule is that a successful appellant gets his costs <sup>(3)</sup>.

The Court of Appeal has all the powers and duties as to amendment and otherwise of the High Court, together with

<sup>(1)</sup> *Laird v. Briggs*, 16 Ch. D. 663; *Mapleson v. Quilter*, 9 Q. B. Div. 972; see Brett's Leading Cases in Modern Equity, p. 314, as to the jurisdiction of the Court of Appeal. See as to

appeal after an award by an official referee, *Serle v. Fardell*, 44 Ch. D. 299.

<sup>(2)</sup> *Hastie v. Hastie*, 1 Ch. D. 562.  
<sup>(3)</sup> 1 Ch. D. 41.

full discretionary power to receive further evidence upon questions of fact, either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal was brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, further evidence except as to matters subsequent to the trial is admitted on special grounds only, and not without special leave of the Court. The Court of Appeal has also power if it thinks fit <sup>(1)</sup> to order a verdict and judgment to be set aside and direct a new trial.

Further evidence on appeal.

If the respondent to the appeal is in any respect dissatisfied with the decision of the Court below, and proposes to contend that it should be varied, he must give notice of his intention, to all persons who may be affected by his contention, but he need not give notice of motion by way of cross-appeal. A plaintiff may appeal though his co-plaintiffs refuse to join <sup>(2)</sup>.

Notice of appeal by respondent.

Persons not parties to the record who desire to appeal can only do so by leave of the Court of Appeal <sup>(3)</sup>.

The notice of appeal by a respondent from a final judgment is an eight days' notice, and upon an interlocutory order a two days' notice <sup>(4)</sup>.

Where a question of fact is involved in an appeal, the affidavit evidence in the Court below is brought before the Court of Appeal in the same way. If the evidence was given orally, a copy of the judge's notes, "or such other materials as the Court may deem expedient" must be produced <sup>(5)</sup>.

An appeal does not, in the absence of special order made either by the Court below or the Court of Appeal, operate as a stay of execution. The application for such an order must be made in the first instance to the Court below <sup>(6)</sup>.

An Act which is to be cited as "the Supreme Court of Judicature Act, 1890" <sup>(7)</sup>, introduced an important change by

Motions for new trial.

<sup>(1)</sup> R. S. C. Order LVIII., r. 5.

<sup>(2)</sup> R. S. C. Order LVIII., r. 6; *Beckett v. Attwood*, 18 Ch. D. 54.

<sup>(3)</sup> *Markham v. Markham*, 16 Ch. D. 1, and see *Re Youngs. Doggett v. Revett*, 36 Ch. D. 421.

<sup>(4)</sup> R. S. C., 1883, Order LVIII., r. 7.

<sup>(5)</sup> See as to the appellant's duty in obtaining a copy of the judge's note: *Ellington v. Clark*, 38 Ch. D. 332.

<sup>(6)</sup> R. S. C., 1883, Order LVIII., rr. 16, 17; *Otto v. Lindford*, 18 Ch. D.

394; *Cropper v. Smith*, 24 Ch. D. 305, and see *Att.-Gen. v. Emerson*, 24 Q. B. D. 56.

<sup>(7)</sup> 53 & 54 Vict. c. 44, s. 4, provides that nothing in the Act shall alter the practice in any criminal cause or matter or in bankruptcy, or in proceedings on the Crown side of the Queen's Bench Division. The same Act also contains provisions as to motions for judgment (*ante*, p. 757), and costs (*post*, p. 803).

providing that after October 24, 1890, every motion for a new trial, or to set aside a verdict, finding or judgment, in any cause or matter in the High Court *in which there has been a trial thereof, or of any issue therein with a jury*, shall be heard and determined by the Court of Appeal and *not* by a Divisional Court of the High Court. This is followed by a proviso, that such motions shall be heard and determined before not less than three judges of the Court of Appeal sitting together.

#### HOUSE OF LORDS.

Practice on  
appeals.

An appeal lies from the Court of Appeal to the House of Lords. All appeals to the House of Lords are by way of petition which must be in a prescribed form, and such appeals must be lodged unless in certain exceptional cases within one year from the date of the last decree, order, judgment, or interlocutor appealed from. A further essential is that all petitions of appeal be signed, and the reasonableness thereof certified, by two counsel who shall have attended as counsel in the Court below, or shall purpose attending as counsel at the hearing in the House of Lords.

The Appellate Jurisdiction Act, 1876 <sup>(1)</sup>, provides that after the commencement of the Act "an appeal shall not lie from any of the Courts from which an appeal to the House of Lords is given by this Act, except in manner provided by this Act, and subject to such conditions as to the value of the subject-matter in dispute, and as to giving security for costs, and as to the time within which the appeal shall be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by orders of the House of Lords."

An important point with reference to the position of the House of Lords as the Court of ultimate appeal from all parts of the United Kingdom which has been recently brought into prominence may here be noticed. Should a question as to Scotch or Irish law arise in an English Court, or *vice versa* should a question as to English law arise in a Scotch or Irish Court, the question must in such case be determined as a question of fact—to be ascertained by the evidence of advocates practising in the Court of the country, the law of which is to be ascertained <sup>(2)</sup>. Should, however, a similar question arise before the House of Lords the position is wholly different. The question as to what is the law, which was a question of fact in the Court

<sup>(1)</sup> 39 & 40 Vict. c. 59.

<sup>(2)</sup> See *post*, p. 869.



below, becomes a question of law in the House of Lords. Their Lordships cannot divest themselves of their judicial knowledge of the law. They cannot (as was said in the last case on the subject <sup>(1)</sup>), on an Irish question, though involved in a Scotch appeal, shut their eyes to the law of Ireland, and determine the rights of the parties in the dark, as the Courts below were compelled to do. This principle is well illustrated by a case referred to in the argument of the case from which we have just quoted.

A question of English law arose in a Scotch Court on an English will, and the Scotch Court directed that a case should be laid before an English counsel. His opinion was acted upon by the Scotch Court, but when the matter came before the House of Lords they reversed the decision of the Scotch Court on the ground that the opinion was wrong in law. Lord St. Leonards on this occasion expressed himself as follows: "Your Lordships from your superior knowledge, are able to set right an erroneous opinion upon any question of English common law or equity; and there ought to be nothing to prevent the House from doing so in the exercise of its appellate jurisdiction, where the question, though foreign to the Scotch Court, is not foreign to this the highest Court of Judicature" <sup>(2)</sup>.

Security for costs is given by recognizance to the amount of Practice. £500 and a bond for £200, or, in lieu of the bond, payment into the fee fund of the House of Lords within one week after the presentation of the appeal. In English appeals six weeks' time, and in Irish and Scotch appeals eight weeks' time, from the date of the presentation of the appeal, is granted to all parties to lodge printed cases and the appendix thereto. The printed case must be signed by one or more counsel who shall have attended as counsel in the Court below or shall purpose attending as counsel in the argument at the bar <sup>(3)</sup>.

<sup>(1)</sup> *Cooper v. Cooper*, 13 App. Cas. 95, 109.

<sup>(2)</sup> *Macpherson v. Macpherson*, 1 Macq. 148.

<sup>(3)</sup> See as to practice with regard to appeals to the House of Lords, direc-

tions to agents, and standing orders supplemental to Annual Practice 1890-1891, pp. 172-180. If any difficulty arises as to the practice, application may be made to the clerks at the office of the House of Lords.

## CHAPTER XVI.

## Costs.

Rules  
prior to  
Judicature  
Act.

The extremely important subject of costs is specially dealt with by the Rules of Court framed under the provisions of the Judicature Acts. The rule previously to the passing of these Acts was that in the Common Law Courts the right to costs depended on various statutes which (subject to certain exceptions) made the costs "follow the event" of the trial, *i.e.* gave them to the successful party. The right to costs, however, was a purely statutory right. There was no such right at common law. In the Court of Chancery, on the other hand, costs were always from the earliest times in the discretion of the Court. "The giving of costs in equity," said Lord Hardwicke, "is entirely discretionary, and is not at all conformable to the rule at law" <sup>(1)</sup>.

It must, however, be borne in mind that in certain cases in the Court of Chancery the costs of proceedings were regulated by statute. Thus, the costs of and incident to the taking of land for public undertakings were regulated by the Lands Clauses Consolidation Act (*ante*, p. 691).

In awarding costs, the Court generally followed the principle of the Roman law, "*Victus victori in expensis damnandus*." But wide as was the discretion of the judge it had limits. Thus, he could make a decree in favour of the plaintiff (*a*) with costs, or (*b*) without costs, or (*c*) order the successful plaintiff to pay all the costs. On the other hand, he could dismiss the action (that is, decide in favour of the defendant) without costs; but he could *not* dismiss the action and order the defendant to pay all the costs, though he might order him to bear any particular costs occasioned by the defendant's improper way of conducting the litigation, *e.g.* costs of scandal, prolixity, needless evidence, and so on. Again, it was an invariable rule of the Court of Chancery that trustees, executors, and mortgagees who had not seriously misconducted themselves, were entitled to costs out

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(1) Cited in *Andrew v. Barnes*, 39 Ch. D. 133.

of the estate as a matter of contract, and the Court had no discretion to deprive them of costs except for gross misconduct.

There are three ways in which costs awarded by any judgment, decree, or order of the Chancery Division may be taxed: (1) As between party and party; (2) as between solicitor and client; and (3) as between solicitor and client but with the addition of other charges and expenses properly incurred, but not strictly costs of action <sup>(1)</sup>.

Modes in which costs may be taxed.

A direction to tax costs simply means that they are to be taxed as between party and party. In a taxation of this kind the principle is that only those charges will be allowed which were reasonably necessary to enable the party to conduct the litigation. If the costs are directed to be taxed "as between solicitor and client," a much more liberal allowance will be made by the taxing master; and a judge of the Chancery Division has jurisdiction in all cases to allow solicitor and client costs to a successful litigant, though it is very rarely and only under most special circumstances that this jurisdiction is exercised <sup>(2)</sup>. Costs, including all charges and expenses properly incurred, are only allowed to persons in a fiduciary position and to mortgagees.

The above rules have been substantially adopted under the new procedure.

Costs are dealt with by Order LXV. of the Rules of Supreme Court, 1883, and rule 1 of this Order provides that, subject to the provisions of the Judicature Acts and Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also, that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order.

Order LXV. rule 1 of the Rules of the Supreme Court, 1883.

When costs are made costs in the action the party who succeeds at the trial is entitled to them.

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<sup>(1)</sup> Morgan and Wurtzburg on Costs, p. 3; and see as to Costs, Brett's Leading Cases in Equity, p. 181, *et seq.*  
<sup>(2)</sup> See *Andrew v. Barnes*, 33 Ch. D. 133.

Jurisdiction as to costs.

In a recent case <sup>(1)</sup>, the plaintiff claimed £78 15s. for a quarter's rent of premises which had been let furnished. The defendant admitted the claim, but counter-claimed for an amount larger than the plaintiff's claim as damages, on account of the unsanitary condition of the premises.

The action was tried by a jury, who found for the defendant on the counter-claim with £17 6s. damages. The judge ordered that judgment should be entered for the plaintiff for the amount of the claim, with costs down to the date of the counter-claim, and judgment for the defendant for £17 16s. on the counter-claim, with the costs of the counter-claim and all costs since the counter-claim, including the costs of the trial. The Court of Appeal decided that the judge had, by his order, prevented the costs from "following the event;" that he had no jurisdiction to do this except for good cause shewn, and that as there was no good cause shewn in the present case, his decision must be reversed.

It will be seen, therefore, that the great distinction made is between actions tried with a jury and actions tried without a jury. In the former case the costs follow the event, unless the judge otherwise orders. In the latter, they are in the discretion of the Court, subject to the above proviso in favour of trustees and others.

The question of the judge's jurisdiction to deprive a plaintiff of his costs was made the subject of careful consideration in a case which came before the House of Lords in 1889 <sup>(2)</sup>. In that case an action was brought against a railway company for damages caused by their negligence, the plaintiff claimed £3000, and the jury awarded him £50. The defendants thereupon applied to the judge to deprive the plaintiff of his costs. The judge declined to exercise his discretion, on the ground that later decisions of the Court of Appeal "had made the principle of the jurisdiction wholly unintelligible to him," but some weeks after he heard both sides, and being of opinion that the plaintiff had "supported an extravagant, and extortionate claim, by fraudulent statements and dishonest acts, and had endeavoured to substantiate it before the jury by evidence which they very properly disbelieved," made an order depriving the plaintiff of his costs. It was contended that the judge's powers were exhausted by what had occurred, that he was in fact *functus*

<sup>(1)</sup> *Wight v. Shaw*, 19 Q. B. D. 396; *Shrapnel v. Laing*, 20 Q. B. D. 334; *Amon v. Bobbett*, 22 Q. B. D. 543.

<sup>(2)</sup> Per Lords Watson, Bramwell, and Herschell in *Huxley v. West London Extension Railway Co.*, L. R. 14 App. Cas. 27.

*officio*, and had no jurisdiction to make the order. The House of Lords decided, affirming the decision of the Court of Appeal, that the judge had jurisdiction, and that the order was rightly made. The following principles were laid down in this case:—

Jurisdiction as to costs.

The concluding words of the rule as to costs which give the Court a discretion as to costs “for good cause” in trials with a jury, embrace everything for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense. So long as the judge or Court deal with considerations of that kind, the sufficiency or insufficiency of these considerations as affording a reason for disallowing costs are matters of which they are constituted sole arbiters; they are acting within their jurisdiction, and their decisions are final and conclusive. On the other hand, if they give effect to considerations which do not constitute “good cause” within the meaning of the rule, they exceed the limits of their jurisdiction.

Finally, it must be noticed that it is provided by the Supreme Court of Judicature Act, 1890 <sup>(1)</sup>, which came into operation on the 24th of October, 1890, that “*subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any Statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid.*”

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(1) 53 & 54 Vict. c. 44.

## CHAPTER XVII.

MISCELLANEOUS BUSINESS IN THE HIGH COURT—EXTRAORDINARY  
REMEDIES.

The attention of the reader may now be directed for a short time to other portions of the business entrusted to the judges of the High Court, which remain still to be noticed.

Business of  
the Divi-  
sional  
Courts.

The Judicature Act, 1873 <sup>(1)</sup>, provides that such causes and matters as are not proper to be heard by a single judge shall be heard by Divisional Courts of the High Court of Justice which shall for that purpose exercise all or any part of the jurisdiction of the High Court. It further provides that any number of such Divisional Courts may sit at the same time, and that every judge of the High Court shall be qualified and empowered to sit in any Divisional Court. The president of each Divisional Court is the senior Judge of those present <sup>(2)</sup>.

The proceedings and matters which are now to be heard and determined before Divisional Courts, are as follows <sup>(3)</sup>:—

- (a) Proceedings on the Crown side of the Queen's Bench Division.
- (b) Appeals from revising-barristers and proceedings relating to election petitions, parliamentary and municipal.
- (c) Appeals under the County Court Act, 1888.
- (d) Proceedings on the revenue side of the Queen's Bench Division.
- (e) Proceedings directed by any Act of Parliament to be taken before the Court, and in which the decision of the Court is final.

<sup>(1)</sup> 36 & 37 Vict. c. 66, s. 40, as amended.

<sup>(2)</sup> See as to the number of the judges constituting a Divisional Court, the Appellate Jurisdiction Act (39 & 40 Vict. c. 59), s. 17; Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 4, and as for motions for new trials, *ante*, p. 798.

<sup>(3)</sup> R. S. C., 1883, Order 59, as altered by County Courts Act, 1888,

and Judicature Act, 1890. The rules provide that nothing herein contained shall be construed so as to take away or limit the power of a single judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so or so as to require any interlocutory proceeding therein heretofore taken before a single judge to be taken before a Divisional Court.

(f) Cases of *habeas corpus* in which a Judge directs that a rule *nisi* for the writ or the writ be made returnable before a Divisional Court.

(g) Special cases where all parties agree that the same should be heard before a Divisional Court.

(h) Appeals from Chambers in the Queen's Bench Division.

A learned writer <sup>(1)</sup> divides the extraordinary remedies by means of which wrongs may in certain cases be redressed, or their continuance prevented, into three heads :—

I. By the act of the party injured.

II. By the mere operation of law independently of the ordinary mode of procedure.

III. By the exercise of extraordinary judicial powers <sup>(2)</sup>.

The principal extraordinary remedies by the exercise of judicial powers, which it will be desirable here to notice, are :

1. The writ of *habeas corpus*; 2. The prerogative writ of mandamus; 3. The writ of prohibition; 4. *Quo warranto* information; 5. Writ of *certiorari*; 6. Petition of right.

The various forms of writ of *habeas corpus* are as follows <sup>(3)</sup> :—

*Habeas corpus.*

1. *Habeas corpus ad subjiciendum*. This writ is used for protecting the liberty of the subject by examining into the legality of commitments for criminal or supposed criminal matters, or of any other forcible detention, including imprisonments and also for admitting to bail prisoners legally committed.

2. *Habeas corpus ad testificandum*, for bringing up prisoners to give evidence.

3. *Habeas corpus ad respondendum*, for bringing up prisoners to be examined or tried on criminal charges.

4. *Habeas corpus ad deliberandum* and *recipias*, for removing prisoners from one custody to another for the purpose of trial; and

5. *Habeas corpus* to bring in the body of a defendant on a return of *cepi corpus*.

In order that liberty should be secure it is necessary, as

<sup>(1)</sup> Broom's Commentaries, 8th ed., p. 200.

<sup>(2)</sup> Under the first head Mr. Broom considers the right of self-defence, which within due bounds may be exercised in defence not only of person but also of property, the right of reception which is sometimes given when a man has been wrongfully deprived of his goods. Entry on his own land by the rightful owner when dispossessed, as to which

see *Beddall v. Maitland*, 17 Ch. D. 174; *Edwick v. Hawkes*, 18 Ch. D. 199. Under the second head the right of retainer to which a creditor is entitled when he is made executor or administrator to his debtor and the right of remitter. See further on these points: Broom's Commentaries, 8th ed. p. 201.

<sup>(3)</sup> See Short and Mellor's Practice of the Crown Office, pp. 335, *et seq.*





otherwise (*except under process in any civil action, suit, or proceeding*), to be examined as a witness in any cause or matter, civil or criminal, and any person so brought up shall be dealt with in like manner in all respects as persons brought up by *habeas corpus*.

The County Court Act, 1888 (51 & 52 Vict. c. 43), s. 112, confers a similar power upon judges of county courts to bring up *prisoners* before them to give evidence.

The Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 18 (2), enables the Court or a judge to order that a writ of *habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before an official or special referee, or before any arbitrator or umpire.

The prerogative writ of mandamus is a high prerogative writ issuing from the Crown side of the Queen's Bench Division of the High Court, commanding the person to whom it is addressed to perform some public or quasi public legal duty which he has refused to perform, and the performance of which cannot be enforced by any other adequate legal remedy <sup>(1)</sup>.

The Judicature Act, 1873 (sect. 25, sub-sect. 8) provides that "a mandamus may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." The mandamus here spoken of is not the prerogative mandamus, but only "a mandamus which may be granted to direct the performance of some acts of something to be done which is the result of an action where an action will lie" <sup>(2)</sup>.

<sup>(1)</sup> *Glossop v. Heston and Isleworth Local Board*, 12 Ch. D. 122. The principal general rules as to granting the high prerogative right of mandamus are summed up by Mr. Shortt in his work on Informations (Criminal and *Quo warranto*), Mandamus, and Prohibition, p. 223, as follows:—

(1) The applicant must have a legal right to the performance of some duty of a public and not merely private character.

(2) There must be no other effective lawful method of enforcing the right.

(3) The Court must be convinced that the remedy by mandamus will be practically effective to secure the object aimed at.

(4) There must have been a demand made upon the person or body on whom the performance of the

duty sought to be enforced is incumbent, and a neglect and refusal by such person or body to perform it.

(5) The application must be to compel the performance of some duty which has not been done, it must not be to order the undoing of an act which has been done.

(6) The application must be made in proper time, *i.e.*, it must not have been delayed too long, neither on the other hand must it be made prematurely; and

(7) The Court must be satisfied as to the propriety of the motives of the applicant. See also Short and Mellor, p. 12.

<sup>(2)</sup> *Re Paris Skating Rink Co.*, 6 Ch. D. 731. See also *Baxter v. London County Council*, 63 L. T. 767; *Mayor, &c., of the County Borough of Salford v. The County Council of Lancashire*, 25 Q. B. D. 384.

Prohibition.

A prohibition is a writ directed usually both to the Judge and parties of a suit in any inferior Court, commanding them to cease from the prosecution thereof. The origin of the writ of prohibition has been stated as follows:—

“As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a great variety of Courts, hence it hath been the care of the Crown that these Courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed.” (1)

The principal cases in which prohibitions have been granted, are as follows:—

To Criminal Courts, to Ecclesiastical Courts of every kind, to the Palatine Courts, the Duchy Courts, the Vice-Chancellor's Court at the Universities, the Mayor's Court of the City of London, County Courts, Martial, Naval and Military Courts, the Courts of the Stannaries, to Coroners, Quarter Sessions, Justices, Courts of Request, and to the Salford Hundred Court (2). No order or proceeding of the Commissioners under the Railway and Canal Traffic Act, 1888, can be restrained by prohibition (3).

*Quo warranto.*

The ancient writ of *quo warranto* which is now obsolete, but upon which the information of the present day is founded, was in the nature of a writ of right for the king against him who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim.

Procedure by *quo warranto* information which is now substituted for the ancient writ, is the appropriate remedy whenever there has been an usurpation of any office, whether created by charter alone or by the Crown with the consent of Parliament (4).

*Quo warranto* informations are of two kinds, those filed *ex officio* by the Attorney or Solicitor-General on behalf of the Crown, and those allowed by the Court to be exhibited by the Master of the Crown Office on the relation of some private individual.

*Certiorari.*

The writ of *certiorari* is the process by which the Queen's Bench Division directs the judges or officers of any inferior court to certify or send proceedings before them, whether for

(1) Bacon's Abridgement, Prohibition.

(2) See further Shortt on Information, &c., p. 431, *et seq.*, and Short and Mellor's Practice of the Crown

Office, p. 75, *et seq.*

(3) Railway & Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, s. 17.

(4) *Darley v. The Queen*, 12 Cl. & F. 541.

the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below <sup>(1)</sup>.

The remedy by petition of right is given when the Crown is in possession of land, goods or money belonging to a subject, the object being to obtain restitution or compensation. A petition of right will also lie for damages in respect of a breach of contract by the Crown <sup>(2)</sup>.

Petition of right.

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<sup>(1)</sup> Short and Mellor's Practice of the Crown Office, p. 219, *et seq.*

<sup>(2)</sup> See *The Windsor, &c., Railway Co. v. The Queen and the Western*

*Counties Railway Co.*, 11 App. Cas. 607, and as to the practice, Annual Practice, 1890-1891, p. 810.

## CHAPTER XVIII.

## BUSINESS OUTSIDE THE HIGH COURT.

Thus far our attention has been occupied with the practice which concerns business done in the High Court and the appeals therefrom. The next subject which claims our attention is a brief consideration of the positions of certain other bodies—some of them Courts in the strictest sense of the term—others not falling inside that category which exercise jurisdiction in this country.

## PARLIAMENTARY BUSINESS.

Mode of  
introduc-  
tion.

A brief reference may first be made to that important class of business—the promotion of private bills in Parliament. Private bills are described or defined by Sir Erskine May <sup>(1)</sup>, as those which are not matters of public policy affecting the community, but are for the particular interest or benefit of any person or persons—*ex. gr.* an individual, a public company, or some particular locality. In dealing with public bills, Parliament acts purely in its legislative capacity, but with regard to private bills its functions are partly legislative and partly judicial. Private bills must be brought in on petition signed by the parties or some of them who are suitors for the bill, and the promoters of such bills must pay fees. An exception, however, exists in the case of bills of a quasi public nature which are introduced as public bills, but are treated like private bills in being referred to a committee, before whom petitioners against are heard. Such bills are spoken of as “hybrid bills” <sup>(2)</sup>.

Before a private bill can be proceeded with, compliance with the Standing Orders must be proved to the satisfaction of the

(1) May's Parliamentary Practice, 9th ed. p. 745, *et seq.*

(2) See May's Parliamentary Practice, 787, and p. 745, *et seq.*, for cases of bills affecting London, Dublin, and Edinburgh being treated as public bills. One of the Standing Orders of the House of Commons (226) pro-

vides “that this House will not insist on its privileges with regard to any clauses in private bills, &c., sent down from the House of Lords, which refer to tolls and charges not in the nature of a tax, or which refer to rates assessed and levied by public authorities for local purposes.”

examiner. The following are the principal points with which compliance must be given:—(1) As to notices by advertisement; (2) Notices and applications to owners, lessees, and occupiers of lands and houses; (3) Documents required to be deposited, and the times and places of deposit; (4) Form in which plans, books of reference, sections, and cross-sections are to be prepared; (5) Estimates and deposit of money, and declarations in certain cases and other matters. Should the examiner report that such compliance has not been proved, an application may be made to the Standing Orders Committee to dispense with the Standing Order and allow the bill to proceed.

Compliance  
with  
Standing  
Orders.

A private bill if opposed after it has passed its second reading is usually referred to a committee consisting of five members in the Lords and four in the Commons, who hear the evidence on both sides and report thereon to the House.

A new point of departure was taken in 1864 with regard to the questions which arise in respect of private bills with reference to *locus standi*, as it is technically called, or the right of petitioners against the bill to be heard. Since that date these questions, when they arise in respect of bills before the House of Commons, are referred to a Court of referees appointed for the purpose, of which the Chairman of Ways and Means is president. In the House of Lords questions of *locus standi* are still dealt with by the committee before whom the bill came.

Private bills are divided for the purposes of Standing Orders into two classes according to the subjects to which they respectively relate. This distinction is extremely important as a point of Parliamentary practice—there being certain requirements rendered necessary by the Standing Orders in respect of deposit of plans, deposit of money in certain cases in respect of the second class. For details, however, we must refer the reader to the Standing Orders.

Business connected with private bills is conducted by Parliamentary agents, by whom counsel may be instructed <sup>(1)</sup>.

#### PRIVY COUNCIL.

The jurisdiction exercised by Her Majesty in Council through the Judicial Committee of the Privy Council extends generally speaking to the whole of the British Empire outside of Great Britain and Ireland. As the House of Lords is the Supreme Court of Appeal for Great Britain and Ireland, so also is the

(1) See May's Parliamentary Practice, 9th ed. 780, *et seq.*

Privy  
Council.

Judicial Committee the Supreme Court of Appeal for India, the Colonies, and the Channel Islands. And as the area of British sovereignty extends, so also is extended the right of appeal to Her Majesty in Council. Of recent years Orders in Council, or local proclamations, have established the right of appeal for such new dependencies as Fiji, Cyprus, and Zululand, and so recently as in October, 1889, an Order in Council (cited as the African Order) gave the Secretary of State for the Colonies powers to constitute, alter, or abolish local jurisdictions, with proper Consular Courts in districts or territories of the Niger protectorate; in districts under the Government of the International Association of the Congo, and also in Madagascar. The Superior Court of any African possession of Her Majesty and of Bombay are to be Courts of Appeal from the prescribed Courts under the Order, and the decisions of such Courts are to be again subject to appeal to the Queen in Council.

The Judicial Committee is also empowered upon reference by Her Majesty in Council to hear appeals in ecclesiastical matters; appeals from Vice-Admiralty Courts; petitions against schemes of the Charity Commissioners, and petitions for the extension of letters patent <sup>(1)</sup>.

#### LUNACY.

The 17th section of the Judicature Act, 1873, enumerates among the jurisdictions which are *not* transferred to or vested in the High Court of Justice, any jurisdiction usually vested in the Lord Chancellor, &c., in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind.

The jurisdiction exercised in lunacy, which rests fundamentally on the prerogative of the Crown as *parens patriæ*, is, as Mr. Pope tells us, almost entirely the creature of statute, but it was originally due to the delegation to the Lord Chancellor by the Crown of the interest (first definitely settled by the Statute of Prerogatives) <sup>(2)</sup> which it took in the estates of all lunatics and idiots.

The law and practice in lunacy matters has been consolidated by an elaborate and important measure which received the Royal assent on the 29th of March, 1890, and came into operation on the 1st of May, 1890, under the title of "The Lunacy Act, 1890" <sup>(3)</sup>. This Act repeals wholly or in part a large

<sup>(1)</sup> See as to the Practice, Macpherson's Practice of the Judicial Committee of the Privy Council; and for an eloquent description of its

jurisdiction, Lord Brougham's speech cited in the Introduction thereto.

<sup>(2)</sup> 17 Edw. 2, cc. 9, 10.

<sup>(3)</sup> 53 Vict. c. 5.

number of Acts which are mentioned in the Fifth Schedule, among others the whole of the Lunacy Act Amendment Act, 1889. The 7th section of the Supreme Court of Judicature Act, 1875, is also repealed, though to a great extent re-enacted by the present measure. The Act is divided into twelve parts, the first parts dealing with the reception of lunatics, their care and treatment, and judicial inquisition as to lunacy. The general control over lunatics in institutions for their reception is exercised by the Commissioners in Lunacy. The sections of the Lunacy Act, 1890, which shall here be noticed are sect. 108, defining the jurisdiction of the "judge in lunacy;" sect. 116, dealing with questions of management and administration; and sect. 132, conferring certain powers upon the county court judges.

Sect. 108 provides "that the jurisdiction of the judge in lunacy under this Act shall be exercised by the Lord Chancellor for the time being entrusted by the Sign Manual of Her Majesty with the care and commitment of the custody of the persons and estates of lunatics <sup>(1)</sup>; acting alone or jointly with any one or more of such judges of the Supreme Court as may for the time being be entrusted as aforesaid, or by any one or more of such judges as aforesaid." A subsequent section (110) provides that the powers and authorities given by the Act to the judges in lunacy shall extend to property within any British possession.

The judge in lunacy is assisted by the masters and the Chancery visitors. The duties of the masters, who are two in number, are partly judicial and partly administrative. The Chancery visitors <sup>(2)</sup> are medical visitors *i.e.*, medical practitioners in actual practice, and legal visitors, *i.e.*, barristers of at least five years' standing. Their duties as distinguished from those of the masters are inspection and supervision.

Sect. 116, dealing with administrative powers of the "judges in lunacy," provides that the powers and provisions of the Act relating to management and administration apply:—

- (a) To lunatics so found by inquisition;
- (b) To lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of the Act;
- (c) To every person lawfully detained as a lunatic, though not so found by inquisition;

(<sup>1</sup>) The term lunatic is defined by the present Act, sect. 341, to include an idiot or person of unsound mind.

(<sup>2</sup>) In addition to the Chancery

visitors, there are under the Lunacy Act, 1890. visiting committees of asylums and visitors of licensed houses.

- (d) To every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the judge in lunacy that such person is through mental infirmity arising from disease or age incapable of managing his affairs;
- (e) To every person with regard to whom it is proved to the satisfaction of the judge in lunacy by the certificate of a master, or by the report of the commissioners, or by affidavit or otherwise, that such person is of unsound mind and incapable of managing his affairs, and that his property does not exceed two thousand pounds in value, or that the income thereof does not exceed one hundred pounds per annum;
- (f) To every person with regard to whom the judge is satisfied by affidavit or otherwise that such person is or has been a criminal lunatic and continues to be insane and in confinement.

It remains to notice the powers conferred by the Act upon county court judges. Sect. 132 provides:—Where a reception order is made in the case of a lunatic, the value of whose real and personal property is under two hundred pounds, and no relative or friend of the lunatic is willing to undertake the management of such property, any judge of county courts having jurisdiction in the place whence the lunatic is sent, may authorise the clerk or relieving officer, or such other person as the judge by his order appoints, to take possession of, sell, and realise, &c., the real and personal property of the lunatic. The judge by whom such order is given may give such directions as he thinks fit as to the application of the property of the lunatic for his benefit and for the other purposes enumerated in the section.

The general principles on which the Court proceeds in dealing with the property of lunatics may now be considered.

Manage-  
ment of  
lunatics'  
property.

"The general management of the Court in respect of lunatics' property," a high authority tells us, "is that of a man tentative and unadventurous; open-handed, to avoid probable loss; sparing, to make possible gain; supremely concerned for his own comfort, and disregarding of the interests and expectations of others; finally, so absolutely satisfied with the existing condition and probable destination of his property that nothing but his own comfort will induce him to change either" <sup>(1)</sup>.

A recent case well illustrates the principle on which the

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<sup>(1)</sup> Pope on Lunacy, 2nd edit. 158.



Court acts in administering the property of lunatics. A lunatic of 82 years of age, entitled to a net income of over £1600 a year, whose next of kin were ten cousins, was in the habit, whilst sane, of making small allowances to three of them who were in humble circumstances. The master recommended that the weekly allowances to the three cousins should be increased, and that weekly allowances should also be made to three other of the lunatic's cousins. There was evidence that all the applicants were in very poor circumstances, and that after payment of the proposed allowances there would still be a surplus income of over £500 a year. The Court decided that the new and increased allowances should not be made, and laid down the following important principle. It is not the duty of the Court to deal benevolently or charitably with the property of a lunatic, and applications for allowances out of the surplus income of a lunatic to poor collateral relations who have no legal claims upon him for provision are to be discouraged <sup>(1)</sup>.

"The jurisdiction," said Bowen, L.J., "ought to be exercised with the utmost jealousy. If we made these allowances it would be making the lunacy of one member of the family a windfall to the others." "It appears," said Fry, L.J., "from all the cases, from *Ex parte Whitbread* <sup>(2)</sup> downwards, that what the judge has to consider is this. He has to see what it is likely the lunatic himself would do if sane. In the present case I am by no means satisfied that, if the lunatic were of sound mind, he would have made any further allowances to these relatives" <sup>(3)</sup>.

Adminis-  
tration of  
lunatic's  
property.

#### RAILWAY COMMISSION.

The attention of the reader may now be directed to the important jurisdiction which is vested in the Railway and Canal Commission under the Railway and Canal Traffic Acts, 1854 to 1888 <sup>(4)</sup>. The key to the understanding of this series of

<sup>(1)</sup> *Re Darling (A Person of Unsound Mind)*, 39 Ch. D. 208, and see the cases, especially, *Re Evans*, 21 Ch. D. 297, there referred to.

<sup>(2)</sup> 2 Mer. 99, decided by Lord Eldon in 1816.

<sup>(3)</sup> The following cases decided under the former Acts may be useful for reference: *Vane v. Vane*, 2 Ch. D. 124; *Re Brandon's Trusts*, 13 Ch. D. 773, correcting to some extent *Vane v. Vane*, *ubi supra*; *Re Tuer's Will Trusts*, 32 Ch. D. 39; *Re Grimmett's Trusts*, 56 L. J. Ch. 419; see, as to

conversion, *ante*, p. 543. And see generally on the subject of lunacy, Pope's Law and Practice of Lunacy, 2nd edit. by J. H. Boome and V. de S. Fowke.

<sup>(4)</sup> The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31); The Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48); The Board of Trade Arbitrations Act, 1874 (37 & 38 Vict. c. 40); The Cheap Trains Act, 1883 (46 & 47 Vict. c. 34); The Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25).

Acts is to be found in the fact that the legislature has here thought it necessary to deal with the question of regulating the practical monopoly with regard to carriage, &c., which has been bestowed upon railway companies. Prior to 1845, when railway companies came to Parliament to obtain powers which were nearly always necessary, Parliament, as the price of its assistance, imposed certain terms upon the companies which were embodied on each occasion in a special Act of Parliament <sup>(1)</sup>.

In 1845 the Railway Clauses Consolidation Act <sup>(2)</sup> was passed, the object of which was to provide generally with regard to railway companies, in the same manner in which special provision had been previously made in individual cases by private Acts of Parliament.

The Railway and Canal Traffic Act of 1854 was the next important step in legislation. This Act imposed upon railway companies the duty of affording due facilities for receiving and forwarding traffic without unreasonable delay.

Railway  
commis-  
sion.

The carrying out of this Act was entrusted to the Court of Common Pleas in England, the Court of Sessions in Scotland, and the Superior Courts in Ireland, but as this jurisdiction was not found to work satisfactorily, the Railway Commissioners were established in 1873, in accordance with the recommendation of a joint select committee of both houses.

The obligations which are imposed upon railway companies are substantially three in number, dealing with (1) reasonable facilities; (2) undue preference, and (3) through rates.

(1) A positive obligation to afford, according to their respective powers, all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles.

<sup>(1)</sup> See *Hall & Co. v. London, Brighton, and South Coast Railway Co.*, 15 Q. B. D. 505. In this case it was pointed out by Wills, J., that this notion of the railway being a highway for the common use of the public, in the same sense that an ordinary highway is so, "was the starting point of English railway legislation. It is deeply engrained in it. In the early days of railways it was acted upon at least occasionally, and in respect of goods traffic, and although it enters but slightly into modern railway practice, no proper understanding of a good deal

of our railway legislation, and pre-eminently of clauses relating to tolls or charges, can be arrived at, unless it is firmly grasped and steadily kept in view. Three states of things were from this point of view to be expected and to be provided for by legislation. The company might be (1) toll takers, and neither conveyers nor carriers; (2) conveyers, but not carriers; (3) carriers."

<sup>(2)</sup> 8 Vict. c. 20, and see particularly sect. 90, "the equality clause" and group of sections of which it is the centre.

(2) To give no undue preferences.

(3) To do whatever may be necessary to enable the company's own line and any other line connected with or having a terminus near it, to be used by the public as continuous lines of communication <sup>(1)</sup>.

A new point of departure has been taken by the Act of 1888 by the appointment of the present Railway and Canal Commission. This body has now been brought into relationship as it were with the High Court by the fact that it is constituted a Court of Record, and that one member of the commission must be a judge of the High Court.

Attention may here be directed to some of the most important of the provisions of the Act of 1888.

Sect. 7 of the Act contains an important provision conferring a *locus standi* on certain public authorities for purposes of complaint, their expenses being provided for under sect. 54 of the same Act.

Sect. 10 enables the commissioners to decide as to the legality of tolls, rates, and charges, and to enforce payment thereof, or so much thereof as they decide to be legal.

An important part of the jurisdiction is also conferred on the Commission under sect. 14 of the Act of 1873, and sect. 33 of Act of 1888, to "dissect" a rate as it is technically called, *i.e.* practically to distinguish the component parts of which the rate is made.

The 12th section confers upon the commissioners a power similar to that which, as we have already seen, the High Court possesses with regard to specific performance and injunction. Where the commissioners have jurisdiction to hear and determine any matter, they may in addition to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges, which, but for this Act, such party would have had by reason of the matter of complaint.

It was decided in a case which came before the Railway and Canal Commissioners in 1889, that the Court had jurisdiction to make an order directing a railway company to resume the conveyance of passengers on a part of their line where the traffic had been discontinued <sup>(2)</sup>.

<sup>(1)</sup> Per Lord Selborne, *South Eastern Railway Co. v. Railway Commissioners*, 6 Q. B. D. 586.

<sup>(2)</sup> *Local Board of Winsford v. Cheshire Lines Committee*, 24 Q. B. D. 456.

Railway  
and Canal  
Traffic Act,  
1888.

A new power is conferred on the commissioners by sect. 14 of the Act, enabling them to order two or more companies to which that part of the Act applies to carry into effect an order of the commissioners, and to make mutual arrangements for that purpose, &c. <sup>(1)</sup>.

Appeals.

The provisions of the Act with regard to appeals are singular. Sect. 17 provides that no "appeal shall lie from the commissioners upon a question of fact, or upon any question regarding the *locus standi* of a complainant, but that save as otherwise provided by this Act, an appeal shall lie from the commissioners to a Superior Court of Appeal. The decision of the Superior Court of Appeal shall be final, provided that where there has been a difference of opinion between any two of such Superior Courts of Appeal, any Superior Court of Appeal in which a matter affected by such difference of opinion is pending may give leave to appeal to the House of Lords, on such terms as to costs as such Court shall determine. Save as provided by this Act, an order or proceeding of the commissioners shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, *certiorari*, or otherwise, either at the instance of the Crown or otherwise."

Board of  
Trade.

The Board of Trade have also considerable powers under the Railway and Canal Traffic Acts. They can hold inquiries, and make provision under the Cheap Trains Act, 1883, for proper and sufficient accommodation for cheap trains. To this it may be added that by the Act of 1888 the appointment of the two appointed commissioners is to be made on the recommendation of the President of the Board of Trade <sup>(2)</sup>.

<sup>(1)</sup> It had been decided that the railway commissioners had not this power under the Act of 1873: *Toomer v. London, Chatham and Dover and South-Eastern Railway Cos.*, 2 Ex. D. 450.

<sup>(2)</sup> Sects. 50 and 51 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), make the following provisions with regard to practice before the Commissioners:—

50. In any proceedings under this Act any party may appear before the Commissioners, either by himself in person or by counsel or solicitor.

51. Any person who shall be certified by the Chairman of Committees of the House of Lords or the Speaker of the House of Commons to have practised for two years before the

passing of this Act in promoting or opposing Bills in Parliament, shall be entitled to practise in any proceedings under this Act as an attorney or agent before the Commissioners: Provided that every such person so practising as aforesaid shall, in respect of such practice and everything relating thereto, be subject to the jurisdiction and orders of the Commissioners, and further provided that no such person shall practise as aforesaid until his name shall have been entered in a roll to be made and kept, and which is hereby authorised to be made and kept by the Commissioners. See further on this subject *Darlington Railway and Canal Traffic Acts*, 1854 to 1888.

## MAYOR'S COURT.

Mayor's  
Court  
Procedure  
Act, 1857.

A few words may now be said with regard to the Mayor's Court, or to speak of it by its full title, "The Court of our Sovereign Lady the Queen, holden before the Lord Mayor and Aldermen of the City of London in the Chamber of the Guildhall of the City of London." The judges of this Court, which is a Court of Record, are theoretically the Lord Mayor and all the aldermen, but by custom the recorder, or the assistant judge, who is a permanent officer of the Court, sits as sole judge. In the absence of the recorder the common serjeant may preside as judge, and in case of illness or unavoidable absence of both the recorder and common serjeant, a practising barrister of seven years' standing may be appointed to act for them for certain periods <sup>(1)</sup>.

The 12th section of the Mayor's Court Procedure Act, 1857 <sup>(2)</sup>, provides that, "Where the debt or damage claimed in any action shall not exceed the sum of £50, no plea to the jurisdiction shall be allowed, provided the defendant, or one of the defendants, shall dwell or carry on business within the city of London, or the liberties thereof, at the time of the action brought, or provided the defendant, or one of the defendants, shall have dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action, either wholly or in part, arose therein."

The 15th section of the same Act provides that, "no defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatsoever, except by plea," but the defendant may nevertheless obtain a prohibition from the High Court, the Mayor's Court being an inferior Court <sup>(3)</sup>.

It was decided in the case of *Hawes v. Paveley* <sup>(4)</sup>, that the effect of these two sections was to extend the jurisdiction of the Mayor's Court in cases within the 12th section, and that consequently a prohibition could not be granted to prohibit an action in the Mayor's Court for a sum of less than £50, the defendant carrying on business, or part of the cause of action having arisen within the city.

<sup>(1)</sup> Mayor's Court Procedure Act, 1857, s. 43.

<sup>(2)</sup> 20 & 21 Vict. c. 157.

<sup>(3)</sup> *Jacobs v. Brett*, L. R. 20 Eq. 1. In a case decided in 1888 it was held that the granting of a writ of prohibition to an inferior Court that had exceeded its jurisdiction was discretionary. *Broad v. Perkins*, 21 Q. B. D.

533, where the prohibition was refused on an application made after judgment but before execution.

<sup>(4)</sup> 1 C. P. D. 418, where the previous cases including the decision of the House of Lords in *Mayor of London v. Cox*, L. R. 2 H. L. 239, are referred to.

Jurisdiction of the Mayor's Court.

The position of the Mayor's Court was well described by Lord Esher in a case decided in 1888 <sup>(1)</sup> as follows:—

“The Mayor's Court is a local Court exercising jurisdiction over an area defined by boundaries appearing on the map; and if it were a merely local Court and nothing more, its jurisdiction would be limited by the boundaries of the city, and every material fact necessary to found jurisdiction must, by the general law applicable to local Courts, have taken place within the locality defined by those boundaries. The 12th section, dealing with such a local Court having jurisdiction within defined boundaries, enlarges that jurisdiction in a peculiar way by enacting that in the particular case no plea to the jurisdiction shall be allowed. In a certain sense the section departs from the idea of locality by speaking of persons not of facts to found jurisdiction which are to happen within the locality. The jurisdiction is practically enlarged by providing that want of jurisdiction shall not be pleaded in certain cases, but the provision is limited to a particular class of persons who ‘shall dwell or carry on business within the city of London.’”

In a case decided in 1888 <sup>(2)</sup> the facts were as follows:—The plaintiff brought an action in the Mayor's Court, as assignee of a debt which was alleged to be due in respect of the price of goods which were sold and delivered to the defendant by the person who had assigned the debt. The sale and delivery of the goods had taken place without the city of London, but the debt had been absolutely assigned in writing to the plaintiff pursuant to the provisions of the Judicature Act, 1873, s. 25, sub-s. 6 (see *ante*, p. 266), within the city of London. The Court of Appeal decided that the assignment of the debt was part cause of action, and that the cause of action having arisen in part within the city of London, the Mayor's Court had jurisdiction, and that consequently there was no ground for a prohibition.

A great variety of interesting cases have arisen on the meaning of the words “dwells” or “carries on business.”

“A joint stock company resides where its place of incorporation is, where the meetings of the whole company, or those who represent it are held, and where its governing body meets in bodily presence for the purposes of the company and exercises the powers conferred upon it by statute and by the articles of association” <sup>(3)</sup>.

The residence of a railway or trading corporation, to quote from

<sup>(1)</sup> *Graham v. Lewis*, 22 Q. B. D. 3.

<sup>(2)</sup> *Read v. Brown*, 22 Q. B. D. 128.

<sup>(3)</sup> *Calcutta Jute Mills v. Nicholson*, 1 Ex. D. 445.

the judgment in the same case, is the place where not the form or shadow of its business, but its real business is carried on, where the central point of the business is, *le centre de l'entreprise*, where the directors meet and exercise their powers, where the books are kept, and from where the great lines emanate. The Great Western Railway Company accordingly resides at Paddington, and the London and North Western Railway Company at Euston, because there is the principal seat of business of the company. There is, said Kelly, C.B., no shadow of authority to shew that a place in which the governing body, the directors, meet, and where the shareholders at large hold their general and special meetings, and exercise their power of transacting the business is not the place where the company resides. In a case to which reference has previously been made, it was decided that a clerk employed by a solicitor at his office in the city of London does not "carry on business" there <sup>(1)</sup>. In this case one of the judges of the Court of Appeal said: "I think that the expression 'carry on business' is not ordinarily used in the sense of a person being busy or doing business merely. A butler employed to look after his master's plate, and perform the other duties of his occupation may be a very busy man, but he could not be said to be carrying on business. A man who busies himself about science, the volunteer movement, or politics, though he may have a great deal of business to transact in respect of those matters, does not carry on business. I think that the expression has a narrower meaning than that of doing business or having business to do. In my opinion it imports that the person has control and direction with respect to a business, and also that it is a business carried on for some pecuniary gain. If that be so, it seems evident that this solicitor's clerk does not carry on business in that sense" <sup>(2)</sup>.

The mode of pleading in the Mayor's Court is chiefly that which existed in the common law Courts under the Common Law Procedure Act <sup>(3)</sup>.

The  
Mayor's  
Court.

#### COUNTY COURTS.

A limited jurisdiction in equity now belongs to county courts by virtue of sect. 67 of the County Courts Act, 1888 <sup>(4)</sup>. Under

Equity  
jurisdiction.

<sup>(1)</sup> *Graham v. Lewis*, 22 Q. B. D. 1.

<sup>(2)</sup> *Graham v. Lewis*, 22 Q. B. D. 5.

<sup>(3)</sup> See further on this subject the Practice and Pleading in the Mayor's Court, London, by E. H. Railton and Rockingham Gill, p. 25, and as to the Mayor's Court generally, Glyn Jackson and Probyn, Jurisdiction,

&c., of the Mayor's Court; and Brandon's Practice. Rules as to Fees and Costs with Schedules approved by the Judges, May 7, 1890, published by Charles Skipper & East of St. Dunstan's Hill, E.C.

<sup>(4)</sup> 51 & 52 Vict. c. 43.

Equity  
jurisdiction  
of county  
courts.

this section there is conferred upon county courts "all the powers and authority of the High Court," in (a) all actions or matters by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law, or next of kin, in which the estate, real and personal, against which, or for an account or administration of which a demand is made, does not exceed £500; (b) all suits for the execution of trusts in which the trust estate does not exceed £500; (c) all suits for foreclosure or redemption, or for enforcing any charge or lien, where the mortgage, charge, or lien does not exceed £500; (d) all suits for the specific performance of, or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property where, in a sale or purchase, the purchase-money, or in case of a lease, the value of the property does not exceed £500; (e) all proceedings under the Trustee Relief Acts, or under the Trustee Acts, in which the trust estate or fund to which the proceeding relates, does not exceed £500; (f) all proceedings relating to the maintenance of infants, in which the infant's property does not exceed in value £500; (g) all suits for the dissolution or winding-up of any partnership where the assets of the partnership do not exceed £500; (h) actions for relief against fraud or mistake, in which the damage sustained, or the estate or fund in respect of which relief is sought, does not exceed £500. In all such proceedings the county court judge is invested with all the power and authority of a judge of the Chancery Division, and the officials of the county court are to discharge duties analogous to those of the officers of that division.

Statutory  
jurisdiction  
of county  
courts.

Besides the jurisdiction in equity conferred by the County Courts Act, several other enactments have empowered the county court to deal with certain specific matters. Thus, under the Settled Land Act, 1882 <sup>(1)</sup>, s. 46 (10), the powers of the Chancery Division may, as regards land not exceeding in capital value £500, or in annual rateable value £30, and as regards capital money arising therefrom, and securities in which the same is invested, and personal chattels settled or to be settled, not exceeding £500, be exercised by any county court within the district whereof is situate any part of the land which is to be dealt with in the court, or from which the capital money to be dealt with in the court arises, or in connection with which the personal chattels to be dealt with in the court are settled.

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(1) 45 & 46 Vict. c. 38.



Under the Building Societies Act, 1874 <sup>(1)</sup>, and the Industrial and Provident Societies Act, 1876 <sup>(2)</sup>, proceedings for the winding-up of societies registered under those Acts are to be taken in the county court. By sect. 41 of the Companies Act, 1867 <sup>(3)</sup>, when the High Court makes an order for winding-up a company, it may, if it thinks fit, direct all subsequent proceedings to be had in a county court, and therefore such county court shall be deemed to be "the Court" within the meaning of the Act, and shall have all the jurisdiction and powers of the High Court.

Lastly, there is the incidental equitable authority conferred by sect. 89 of the Judicature Act, 1873 <sup>(4)</sup>. This section provides that every inferior Court having jurisdiction in equity, or at law or in equity, shall, as regards all causes of action within its jurisdiction, have power to grant, and shall grant in every proceeding, such relief, redress, or remedy, and shall give such effect to every ground of defence or counter-claim, subject to the limits of the jurisdiction of such courts, in as full and ample a manner as might be done in the like case by the High Court.

Where during the progress of any equitable action or matter commenced under sect. 67 of the County Courts Act it appears that the subject-matter thereof exceeds the limit of county court jurisdiction (*i.e.* £500), the validity of any order or decree already made is not thereby affected, but the judge must direct the transfer of the proceeding to the Chancery Division, but any party may apply to a judge of that division at chambers for an order directing the action or matter to be prosecuted in the county court, and such judge may, if he deem it right, make such order (sect. 68) <sup>(5)</sup>.

Transfer  
to High  
Court.

As to remittance of equitable proceedings from the High Court to a county court, sect. 69 of the County Courts Act, 1888, enacts that where any action or matter which might have been commenced in a county court is pending in the Chancery Division of the High Court, any of the parties thereto may apply at chambers to the judge to whom the same is attached to have it transferred to the county court or one of the county courts in which it might have been commenced, and the judge is empowered upon such application, or without such application

Remittance  
of matters  
to County  
Court.

<sup>(1)</sup> 37 & 38 Vict. c. 42, ss. 4 and 32; and see Wurtzburg on Building Societies, p. 126.

<sup>(2)</sup> 39 & 40 Vict. c. 45, s. 17.

<sup>(3)</sup> 30 & 31 Vict. c. 131.

<sup>(4)</sup> 36 & 37 Vict. c. 66.

<sup>(5)</sup> The procedure incident upon such transfer is regulated by Order xxxiii, rr. 5-7, of the County Court Rules, 1889.

if he shall see fit, to order such transfer, and thereupon such action or matter is to be carried on in the county court, and the right of appeal is to be the same as if the suit or proceeding had been commenced in the county court <sup>(1)</sup>.

Appeals.

Sect. 120 of the County Courts Act, 1888, provides that a party in any action or matter dissatisfied "with the determination or direction of the judge in point of law or equity" may appeal to the High Court. Such appeals must be brought to a Divisional Court of the Queen's Bench Division, inasmuch as the 34th section of the Judicature Act, 1873, expressly excepts county court appeals from matters assigned to the Chancery Division; and the 45th section of the same Act provides that all appeals from a county court which might before its passing have been brought to any court or judge whose jurisdiction was by that Act transferred to the High Court, may be heard and determined by divisional courts consisting of such judges as may from time to time be assigned for the purpose <sup>(2)</sup>.

Jurisdiction.

With regard to *jurisdiction* in Common Law actions, sect. 56 of the County Courts Consolidation Act, 1888 <sup>(3)</sup>, enacts that "All personal actions where the debt, demand, or damage claimed is not more than £50, whether on balance of account or otherwise, may be commenced in the court; and all such actions shall be heard and determined in a summary way, according to the provisions of the Act: Provided always that, except as in this Act provided, the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question, or for any libel or slander, or for seduction, or breach of promise of marriage."

A limited jurisdiction is reserved by subsequent sections in respect of ejectment, and where the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or

<sup>(1)</sup> Rules for the working out of this section are contained in Order xxxiii. of the County Court Rules, 1889.

<sup>(2)</sup> Procedure on appeal is regulated by sect. 121 R. S. C., Order lix., rr. 9, 17, and County Court Rules, 1889. Order xxxii., rule 13, of the former order as regards the furnishing of the judge's notes for the purpose of an appeal is, however, repealed by sect. 121; so that it is now the duty of an appellant, as a condition precedent to the appeal being heard, to

furnish the Court with a copy of such notes: *McGrah v. Cartwright*, 23 Q. B. D. 3; 60 L. T. R. (N. S.) 537.

<sup>(3)</sup> 51 & 52 Vict. c. 43, repealing the whole of the County Court Act, 1846. The reader who desires further information on the subject of the jurisdiction of County Courts is referred to the County Court Practice, by J. S. G. McCullagh. See also the Annual County Court Practice and Pitt Lewis's County Court Practice.

franchise is in question, where neither the value of the land nor the rent thereof exceeds £50 <sup>(1)</sup>.

As regards all actions of contract, however, where the plaintiff claims more than £20, and of tort, where the plaintiff claims more than £10, the defendant may give notice that he objects to the action being tried in the county court, and give security for the claim and costs, and thereupon and upon the certificate of the judge that in his opinion some important question of law or fact is likely to arise in the action, such action shall be stayed.

It should also be pointed out that the Bankruptcy Act, 1883 <sup>(2)</sup>, provides (1) that the courts having jurisdiction under that Act shall be the High Court and county courts; (2) that the term "district," when used with reference to a county court, means the district of the Court for the purposes of bankruptcy jurisdiction. Sect. 95: "(1) If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district as defined by this Act for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any county court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court. (2) In any other case the petition shall be presented to the county court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition."

County  
courts.

#### JURISDICTION OF JUSTICES OF THE PEACE.

Justices of the peace exercise their jurisdiction by virtue of commission from the Queen. In every county in England, and in certain other jurisdictions, including certain municipalities, there is a commission of the peace. Justices exercise their jurisdiction in quarter sessions, or "out of sessions," that is, in petty or special sessions, and in various other ways. At quarter sessions they elect a chairman to perform their judicial duties, and such few administrative duties as have not been transferred from them to the county council.

By the Local Government Act <sup>(3)</sup>, sect. 3, certain of these powers are transferred to the county council of each county or

<sup>(1)</sup> 51 & 52 Vict. c. 43, ss. 59, 60, 99, 106, 102.  
138, 139.

<sup>(3)</sup> 51 & 52 Vict. c. 41.

<sup>(2)</sup> 46 & 47 Vict. c. 52, ss. 92, 95.

Justices of  
the peace.

other jurisdiction, the members of such county council being elected by the ratepayers of the different divisions of the county, &c., into which it is divided. Among the powers so transferred may be mentioned the making of the county rate and management of the county fund, the borrowing of money, the maintenance and repair of main roads <sup>(1)</sup>, the building and repair of county bridges, the granting of licenses for music and dancing and racecourses, pauper lunatic asylums, reformatory and industrial schools, county coroners and officers, the administration of the Contagious Diseases (Animals) Acts <sup>(2)</sup>. One duty of quarter sessions, which is not wholly transferred to the county council, namely, the control of the police, will be undertaken by a joint committee of the county council and of the justices in quarter sessions. Other duties of justices in quarter sessions which they retain, and which are not affected in any degree by the Local Government Act, are their judicial duties. Firstly, the chairman, with the assistance of the other justices, and by means of a jury, tries indictments for that class of offences with respect to which jurisdiction is given by statute. The justices of quarter sessions, under the presidency of their chairman, but without a jury, try appeals against the decisions of justices in petty sessions, both in criminal and certain *quasi* criminal and civil matters over which they have control. For purposes of petty and special sessions, each county is divided into petty sessional divisions. In all or nearly all of them there is a petty sessional court-house and one or more occasional court-houses. When justices sit at one of the latter places, their power to punish by fine or imprisonment is limited. But though a justice usually acts for one division, his jurisdiction extends over the whole county, and he may sit anywhere in the county for most purposes. At petty sessions the justices sit to hear matters which are within their summary jurisdiction. These are <sup>(3)</sup> either criminal, such as assaults, drunkenness, and similar offences of a minor kind; or civil, such as bastardy, maintenance of the poor by their relatives, disputes between employers and workmen, and the like. In special sessions justices sit to grant and renew licenses for the sale of liquor, to hear appeals against poor-rates, and for a few other purposes. Special sessions are so called because each justice of the division is specially summoned to attend. Besides these summary powers, justices have the power to inquire into all charges of indictable offences.

<sup>(1)</sup> Stephen and Miller's County Council Compendium, 2nd ed. pp. 5, 6, 68, 69.

<sup>(2)</sup> See McMorran's Local Govern-

ment Act, 2nd ed.

<sup>(3)</sup> See List, p. xi., Stone's Justice's Manual.

Their duty in this respect is simply to take the evidence, and, if they think that a *prima facie* case is made out against the accused, to commit him for trial to assizes or quarter sessions<sup>(1)</sup>. In certain cases of indictable offences they have under the Summary Jurisdiction Act, 1879, power to dispose summarily of the charges, when the amount involved is small or when the accused consents to be so dealt with. It should be borne in mind that the jurisdiction of justices depends upon the provisions of a very large number of statutes. With certain exceptions the justices perform their functions without fee or reward, but in the metropolis and other large municipalities where the business is too important and complex to be undertaken by persons without a legal training, magistrates paid by salaries are appointed.

Justices of  
the peace.

To revert for one moment to the jurisdiction of quarter sessions, it is necessary to state that in those municipalities which have a grant of quarter sessions in addition to a separate commission, a recorder is appointed, who must be a barrister of five years' standing. In his jurisdiction he absorbs in himself the functions which would otherwise be exercised by the quarter sessions bench<sup>(2)</sup>.

The subject of Local Government is so vast, and such important changes would appear to be imminent in the immediate future, that it has been deemed advisable to omit from the present work any account of the numerous authorities, boards, and other bodies at present entrusted with its administration. The reader who desires further information on this interesting subject is referred to the work mentioned in the note, where he will find the existing organization of local government in England considered under the two heads of (1) the existing units of local government in England and (2) the matters which are locally administered<sup>(3)</sup>.

Other courts, which may here be mentioned, are the Palatine Court of Lancashire, the Palatine Court of Durham<sup>(4)</sup>, the

(1) See now the Assizes Relief Act, 52 & 53 Vict. c. 12.

(2) See list of municipalities, with their characteristics in this respect in English Municipal Code, by Somers Vine, published by Waterlow & Sons, and also Archbold's Q. S., p. 1008.

(3) Local Government and Local Taxation in England and Wales, by R. S. Wright and H. Hobhouse, M.P. This work must, of course be, read subject to the changes introduced by

the Local Government Act, 1888.

The attention of the reader may also be directed in connection with this subject to the following Acts passed in the year 1890. The Public Health Act Amendment Act, 1890 (53 & 54 Vict. c. 59). The Metropolis Management Act, 1862, Amendment Act, 1890 (53 & 54 Vict. c. 54). The Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66).

(4) See the Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47).

Court of Passage in Liverpool, the Stannary Court, held before the Vice-Warden of the Stannaries in Devonshire and Cornwall.

Court to  
have juris-  
diction of  
Chancery  
Division.

An Act which is to be cited as the Chancery of Lancaster Act, 1890 (1), provides that after the passing of the Act (July 25, 1890) the Court of Chancery of the County Palatine of Lancaster, called the Lancaster Chancery Court shall, "as regards all persons, bodies corporate, and property within or becoming subject to its jurisdiction, have and exercise the like powers and jurisdiction, and in a similar manner, and subject to the same restrictions in all respects, as the High Court in its Chancery Division now has and exercises, or may, under or by virtue of any Act of Parliament hereafter passed, and not expressly enacting to the contrary hereof, have and exercise, in respect of all persons, bodies corporate, and property within its jurisdiction."

Jurisdic-  
tion of  
Court of  
Appeal.

It is also provided by the same Act that Her Majesty's Court of Appeal shall, as to all judgments and orders of the Lancaster Chancery Court, have and exercise the like appellate and original jurisdiction as the Court of Appeal now has and exercises, or may, under or by virtue of any Act of Parliament hereafter passed, and not expressly enacting to the contrary hereof, have and exercise with respect to judgments and orders of the High Court or of any judge thereof.

The Act also provides that judgments and orders of the Court of Appeal in causes or matters in the Lancaster Chancery Court are to be subject to appeal to the House of Lords in like manner as judgments or orders of the Court of Appeal in causes or matters commenced or pending in the High Court.

(1) 53 & 54 Vict. c. 23, s. 5, provides for transfer of causes and matters to the High Court, as follows:—

(1.) Any cause or matter in the Lancaster Chancery Court, which but for the passing of this Act the Lancaster Chancery Court would not have been competent to try or deal with, and which if the same had been commenced in the High Court would not, under the provisions of the Supreme Court of Judicature Act, 1873, and the Acts amending it or any rules made under those Acts, have been assigned to the Chancery Division of the High Court, may at any stage be transferred from the Lancaster Chancery Court to the High Court by an order either of the Court of Appeal or of the Lancaster

Chancery Court.

(2.) In the case of any such transfer all proceedings in the cause or matter shall be transmitted from the Lancaster Chancery Court to the High Court, and shall be filed there; and the cause or matter shall thereafter be proceeded with according to the practice of the High Court as if the cause or matter had been commenced in the High Court.

The Commissioner for Oaths Amendment Act, 1890 (53 & 54 Vict. c. 7), provides that an affidavit to be used in a county court may be sworn before any commissioner to administer oaths in the Court of Chancery of the County Palatine of Lancaster not being a registrar of a county court.

## CHAPTER XIX.

## COUNSEL AND SOLICITORS.

Having thus described, so far as the limits of space will permit, the more important features of the practice of the Supreme Court of Judicature, and glanced at the principal of the other Courts and bodies which exercise jurisdiction in this country, we may next briefly consider the law which immediately concerns counsel and solicitors—the members of the two branches of the profession to whom the conduct of legal business is entrusted.

These are (1) Barristers or counsel, who are either members of the inner bar, *i.e.*, Queen's counsel, or members of the outer or junior bar. Formerly all judges of the Common Law Courts were required to take, or to have taken, the degree of Serjeant at law <sup>(1)</sup>, but this was rendered unnecessary by the Judicature Act, 1873 <sup>(2)</sup>. All barristers must be members of one of the four Inns of Court, Lincoln's Inn, Inner Temple, Middle Temple, or Gray's Inn, and (since 1872) must have passed certain examinations in Roman and English law. (2) Solicitors, who require the following qualifications for practice:—(1) due service under articles for a prescribed period, usually five years, but in the case of certain graduates three years <sup>(3)</sup>; (2) to have passed the examinations prescribed by the Incorporated Law Society; (3) due admission as hereinafter mentioned; (4) to have taken out an annual stamped certificate.

Barristers of five years' standing, who desire to be admitted as solicitors, are exempted on certain terms from the intermediate examinations and from service under articles <sup>(4)</sup>. A corresponding rule very recently passed by the Inns of Court provides that "a student who, previously to his admission at an Inn of Court, was a solicitor in practice for not less than

Counsel.

Solicitors.

Regulations as to passing from one branch of the profession to the other.

(1) The reader who desires further information on this subject is referred to Pulling's Order of the Coif, the Inns of Court Calendar, Slater's Guide to the Legal Profession. In 1880 the Society of Serjeants' Inn

was dissolved, and its property in Chancery Lane sold.

(2) 36 & 37 Vict. c. 66, s. 8.

(3) See Cordery on Solicitors, 2nd ed. p. 12, for other exceptions.

(4) 40 & 41 Vict. c. 25, s. 12.

five years (and, in accordance with rule 7, has ceased to be a solicitor before his admission as a student) may be examined for call to the Bar without keeping any terms, and may be called to the Bar upon passing the public examination required by these rules, without keeping any terms: Provided that such solicitor has given at least twelve months' notice in writing to each of the four Inns of Court, and to the Incorporated Law Society, of his intention to seek call to the Bar, and produce a certificate signed by two members of the council of the Incorporated Law Society, that he is a fit and proper person to be called to the Bar" (1).

A student coming under the last preceding rule may be exempted by the masters of the bench of the Inn to which he seeks admission from passing the examination preliminary to admission.

Retainer.

The consideration of our subject may be well commenced by noticing the practice in the preliminary stages of litigation. In cases where it is deemed desirable to obtain the services of a particular counsel in a certain matter the object is effected by leaving with his clerk a written "retainer" accompanied by a fee. The retainer may be either "general" or "special."

General  
retainer.

A general retainer is a retainer given by or on behalf of a client to secure the services of counsel in any litigation in which the client may thereafter be involved. Its effect is to entitle the client to have notice if a brief against him be afterwards tendered to the counsel so generally retained, and the first option of specially retaining such counsel's services. A special retainer is a retainer given to secure the services of counsel in a particular action or matter. It can only be given after the action (or other proceeding) has been commenced. It can however be given before the writ or petition has been served on the defendant or respondent (2).

Special  
retainer.

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(1) Rule 7, above referred to, is as follows:—No attorney-at-law, solicitor, writer to the Signet, or writer of the Scotch Courts, proctor, notary public, clerk in chancery, parliamentary agent, or agent in any Court original or appellate, clerk to any justice of the peace, or persons acting in any of these capacities, and no clerk to any barrister, conveyancer, pleader, equity draftsman, attorney, solicitor, writer to the Signet, or writer of the Scotch Courts, proctor, notary public, parliamentary agent, or agent in any Court original or

appellate, clerk in chancery, clerk of the peace, clerk to any justice of the peace, or to any officer in any Court of law or equity, and no person acting in the capacity of any such clerk shall be admitted as a student at any Inn of Court until such person shall have entirely and *bonâ fide* ceased to act or practise in any of the capacities above named or described; and if on the rolls of any Court, shall have taken his name off the rolls thereof.

(2) See Counsel's Retainer, by E. B. G., 1888.



With regard to the retainer of a solicitor the law has been judicially summed up as follows:—"It is the duty of a solicitor <sup>(1)</sup> to obtain a written authority from his client before he commences a suit. If circumstances are urgent, and he is obliged to commence proceedings without such authority, he should obtain it as soon after as he can. An authority may, however, be implied where the client acquiesces in and adopts the proceedings, but if the solicitor's authority is disputed, it is for him to prove it, and if he has no written authority, and there is nothing but assertion against assertion, the Court will treat him as unauthorised, and he must abide by the consequences of his neglect."

Retainer of  
solicitor.

A marked distinction between the position of counsel and solicitors may here be noticed.

The law which directly affects counsel, as distinguished from other members of the community, is comparatively slight. Barristers, as has already been pointed out (*ante*, p. 385), cannot sue for the recovery of their fees, nor can they be sued for negligence in respect of legal business. The principle established by the leading case of *Kennedy v. Broun*, that the fee of counsel is only a honorarium has been carried to its logical conclusion, and it has been laid down that a solicitor has no authority to pledge his client's credit to counsel, and thus convert the moral obligation into a legal debt <sup>(2)</sup>. Solicitors, on the other hand, can sue (but subject, as we shall see, to certain restrictions), for the recovery of their charges, and can be sued for negligence. The law and practice affecting solicitors is indeed so intricate and complicated that it will be impossible here to do more than briefly to sketch them, and to refer the reader who desires further information to the statutes and the principal of the very numerous decisions on the subject, where, with the help of the able treatises which have been devoted to this particular branch of law, he may obtain such further knowledge as he requires.

Counsel's  
fees.

The Court has no jurisdiction to interfere between the benchers and a member of one of the Inns of Court. The only right of appeal which a member who considers himself aggrieved possesses is to the judges of the superior Courts as visitors of the Societies <sup>(3)</sup>.

Counsel have the *exclusive* right of audience in the High

(<sup>1</sup>) Per Lord Langdale, M.R., *Allen v. Bone*, 4 Beav. 493; and see *Eley v. The Positive Government Security Life Assurance Co.*, 1 Ex. D. 20, and (on appeal) 88.

457, where the authorities are collected.

(<sup>3</sup>) See *Neate v. Denman*, L. R. 18 Eq. 127, and the authorities there collected.

(<sup>2</sup>) *Mostyn v. Mostyn*, L. R. 5 Ch.

Right of  
audience.

Court (except in Bankruptcy, where the privilege is shared with solicitors), in the Court of Appeal, in the House of Lords, and in the Privy Council, where colonial counsel are allowed to plead. Solicitors have right of audience before the Railway and Canal Commission, in the county courts, in bankruptcy business (including appeals to the Divisional Court from county courts, but not in the Court of Appeal), in the chambers of the High Court and in Police Courts.

It is not a rule of law, but only a rule of etiquette, that counsel must be instructed by a solicitor. In criminal business the services of counsel may be obtained without the intervention of a solicitor.

Privilege of  
counsel.

The law with regard to the privilege of counsel has been definitely settled by a case which came before the Court of Appeal. That case established that no action will lie against a barrister for defamatory words spoken as counsel in the course of any judicial proceeding with reference thereto, even though they were unnecessary to support the case of his client, and were uttered without any justification or excuse, and from personal ill-will or anger towards the plaintiff arising from some previously existing cause, and are irrelevant to every question of fact which is in issue before the tribunal <sup>(1)</sup>.

"This decision," says Mr. Odgers, who points out that the previous decisions had not gone so far, "gives to an advocate the same absolute immunity as is enjoyed by a judge of a superior Court." The reason why the rule is made so wide was stated by Lord Esher to be, not to protect counsel who deliberately and maliciously slander others, but in order that innocent counsel who act *bonâ fide* may not be "unrighteously harassed with suits." It must, moreover, be borne in mind that a solicitor while acting as an advocate in a court where he is allowed to practice enjoys the same immunity as counsel. A like privilege is extended to any observation made by a jurymen, provided always that such observation is pertinent to the inquiry before the Court <sup>(2)</sup>. If a person conducts his (or her) own case in person, the law proceeds on the principle that he (or she) may be ignorant of the proper mode of proceeding, and even greater latitude is allowed.

The authority of counsel to compromise an action was considered in a very recent case <sup>(3)</sup>. The action was for malicious pro-

<sup>(1)</sup> *Munster v. Lamb*, 11 Q. B. D. 588, and see the cases cited and referred to in the arguments and judgments.

<sup>(2)</sup> Odgers on Libel, 2nd ed. 187, 190.

<sup>(3)</sup> *Matthews v. Munster*, 20 Q. B. D. 141. It is within the general autho-

secution, and the defendant and his solicitor, who were on their way from Brighton, telegraphed that they would be in London at eleven o'clock; before, however, they arrived at the Court, and during the progress of the plaintiff's case, the defendant's counsel, acting on a suggestion made by the judge, consented to a verdict for a considerable sum, with costs, and agreed that all imputations should be withdrawn against the plaintiffs. The question was whether this compromise could be set aside. The Court of Appeal decided, affirming the decision of the Queen's Bench Division, that it could not.

Authority  
to com-  
promise.

The following passage of a well-known judgment of the late Chief Baron Pollock <sup>(1)</sup> was cited with approval by the Court of Appeal, as containing a general statement of the law upon the subject: "We are of opinion that although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it—such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial—we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it." The instances that are given shew that one of the things that counsel may do, so long as the request of the client to him to act as advocate is in force, is to assent to a verdict for a particular amount and upon certain conditions and terms; and the consent of the advocate to a verdict against his client and the withdrawing of imputations is a matter within the expression "conduct of the cause and all that is incidental to it."

In the present case, the Court considered that, in the compromise itself, there was nothing collateral to the action, nothing unjust; that there was no mistake of fact on the part of counsel; that, in the absence of all these matters, it was plainly the duty of counsel to do that which he considered best for his client, and that all that was done fell clearly within the reasonable scope of the advocate's authority, and accordingly the compromise was upheld.

An interesting case with regard to the privilege of counsel came before the Court in 1889 <sup>(2)</sup>. The plaintiff who had

Privilege of  
counsel.

right of counsel in conducting a case to consent to the withdrawal of a juror (*ante*, p. 756), and such compromise binds the client notwithstanding his dissent, unless such dissent was brought to the knowledge of the

opposite party at the time. *Strauss v. Francis*, L. R. 1 Q. B. 379.

<sup>(1)</sup> *Swinfen v. Lord Chelmsford*, 5 H. & N. 890.

<sup>(2)</sup> *Lowden v. Blakey*, 23 Q. B. D. 332.

Privilege of  
counsel.

succeeded in an action in the Chancery Division, which he had brought to restrain an infringement of his trade-mark, drafted an advertisement of the proceedings in and result of the action for publication in a trade journal. Being not unnaturally apprehensive that the publication might be considered libellous, he submitted the draft to counsel, and the advertisement so settled was published. One of the defendants in the Chancery action alleged that the advertisement was libellous, and brought an action in respect of it. In this action he sought to obtain inspection of the draft advertisement. The Court, however, decided that the document was privileged <sup>(1)</sup>.

A counsel who is deemed to have been guilty of improper conduct may be "disbarred" or suspended from practice *pro temp.* The somewhat analogous penalty in the case of a solicitor is that he be "struck off the rolls" (or suspended from practice *pro temp.*) by order of the Court (as to which, see *post*, p. 836, *et seq.*).

#### SOLICITORS.

Judicature  
Act, 1873,  
s. 87.

The 87th section of the Judicature Act, 1873 <sup>(2)</sup>, provided that after the commencement of that Act (2nd Nov., 1875) all persons who had been admitted as solicitors, attorneys, or proctors, or were by law empowered to practise in any Court, the jurisdiction of which was thereby transferred to the High Court of Justice or the Court of Appeal, should be called *Solicitors of the Supreme Court*, and should be entitled to the same privileges, and subject to the same obligations, so far as circumstances would admit, as if the Act had not passed.

The section then went on to make a similar provision with

<sup>(1)</sup> The following recent cases as to the position of counsel may be referred to: *Harrison v. Wearing*, 11 Ch. D. 206; *Brown v. Sewell*, 16 Ch. D. 517; *Svensen v. Wallace*, 16 Q. B. D. 27; *Easton v. London Joint Stock Bank*, 38 Ch. D. 25; *Ebrard v. Gassier*, W. N., 1886, p. 165; *Boswell v. Coaks*, 36 Ch. D. 444; *In re Harrison*, 33 Ch. D. 52; *Collins v. Worley*, W. N. 1889, p. 115; *Linwood v. Andrews*, W. N. 1888, p. 81.

<sup>(2)</sup> The power of adapting by regulation any enactments, declarations, certificates, or forms to the solicitors of the Supreme Court is now vested in the Master of the Rolls, with the concurrence of the Lord Chancellor and the Lord Chief Justice of England, or in case of difference, of one of them.

It was decided by the majority of the Court of Appeal in *In re*

*Pollard*, 20 Q. B. D. 656, that the jurisdiction given by sect. 37 of the Solicitors Act, 1843, to order delivery of a solicitor's bill of costs "where no part of the business charged for has been transacted in any court of law or equity," was given to the Lord Chancellor and Master of the Rolls as Judges of the Court of Chancery, and was transferred to the High Court of Justice by sect. 16 of the Judicature Act, 1873. The Judges of the Queen's Bench Division accordingly have jurisdiction to order delivery of a bill of costs in such a case; but the Court considered that the application which had been made to that division was irregular, that it ought to have been made in the Chancery Division, and they accordingly made the applicants pay the costs of the appeal.

regard to all persons who from time to time should be entitled to be admitted in the future. All the solicitors, attorneys, and proctors to whom the section applies are to be deemed to be officers of the Supreme Court <sup>(1)</sup>. It is also provided by the Judicature Act, 1875, as a consequence of the preceding change, that the Registrar of Attorneys and Solicitors shall be called "the Registrar of Solicitors" <sup>(2)</sup>.

No person may act as solicitor in proceedings in any Court, or even in non-contentious proceedings, which according to the Rules of Court can only be conducted by a solicitor, unless he has been "admitted, enrolled and otherwise duly qualified." An infringement of this provision is a contempt of court, entails liability to a fine and incapacity to recover fees, and is also an indictable offence <sup>(3)</sup>.

The *Custody of the Roll* of the Solicitors of the Supreme Court of Judicature in England was, until recently, entrusted to the Clerk of the Petty Bag. The Solicitors Act, 1888 <sup>(4)</sup>, provides for the transfer to, and the performance by, the Incorporated Law Society of the duties of the Petty Bag Office. This Act, which came into operation on the 1st of February, 1889, does not extend to Scotland or Ireland. By it, the books containing the roll of solicitors, and any other documents relating thereto, were directed to be transferred to and kept in the custody of the Incorporated Law Society as Registrar of Solicitors. The roll of solicitors is to be open during office hours to the inspection of any person without fee or reward.

The Solicitors Act, 1888.

The provisions of the Solicitors Act of 1888 are of very considerable importance, and it will therefore be necessary to refer to them somewhat in detail. They are chiefly concerned with (1) the articles of clerkship <sup>(5)</sup> under which all persons (except

<sup>(1)</sup> See as to the summary jurisdiction exercised by the Court on solicitors or its officers, Cordery on Solicitors, 2nd ed. p. 135, *et seq.*; and see *Re Freston*, 11 Q. B. D. 545; *Re Dudley*, 12 Q. B. D. 44, as to the punitive and disciplinary nature of such proceedings.

<sup>(2)</sup> The following are the principal Acts which directly affect solicitors:—

6 & 7 Vict. c. 73 (the Solicitors Act, 1843); 23 & 24 Vict. c. 127 (the Solicitors Act, 1860); 33 & 34 Vict. c. 28 (the Solicitors Act, 1870); 37 & 38 Vict. c. 68 (the Solicitors Act, 1874); 38 & 39 Vict. c. 79 (the Legal Practitioners Act, 1875); 40 & 41 Vict. c. 25 (the Solicitors Act, 1877);

40 & 41 Vict. c. 62 (the Legal Practitioners Act, 1877); 44 & 45 Vict. c. 44 (the Solicitors' Remuneration Act, 1881); 51 & 52 Vict. c. 65 (the Solicitors Act, 1888).

<sup>(3)</sup> 6 & 7 Vict. c. 73, s. 2; *Re Simmons*, 15 Q. B. D. 348. See as to law stationers, *Law Society v. Waterlow*, 8 App. Cas. 407; and see further in Cordery on Solicitors, 2nd ed. p. 36, *et seq.*; and see *The Queen v. Buchanan*, 15 L. J. Q. B. 227. See also *Re Eede*, 25 Q. B. D. 228, as to appeal by solicitor.

<sup>(4)</sup> 51 & 52 Vict. c. 65.

<sup>(5)</sup> See Cordery on Solicitors, 2nd ed. p. 6, *et seq.*

The Solicitors Act,  
1888.

barristers of five years' standing and colonial attorneys in certain cases) must serve before they can be admitted as solicitors; (2) the admission of solicitors; and (3) striking solicitors off the rolls<sup>(1)</sup>.

*As to Articles of Clerkship*, the Act provides for the registration of such articles by the registrar within six months from the date thereof, and that the book in which the entry of registration is made shall, during office hours, be open to inspection by any person without fee or reward.

The registrar may, if he thinks fit, before registering any articles, require the execution thereof to be verified by a statutory declaration.

It should be borne in mind that the Act provides that if articles of clerkship are not registered within six months from their date, they may be subsequently produced and entered; but in that case the service of the clerk shall be reckoned to commence from the date of the production for entry, unless the Master of the Rolls shall otherwise direct<sup>(2)</sup>.

*As to the Admission of Solicitors*, the Act provides (sect. 10) that a person who has obtained from the Society a certificate of having passed a final examination, may apply to the Master of the Rolls to be admitted as a solicitor; and thereupon the Master of the Rolls, unless cause to the contrary is shewn to his satisfaction, shall by writing under his hand admit, in such manner and form as he shall from time to time direct, such person to be a solicitor, and (sect. 11) on production of the admission signed by the Master of the Rolls, and on payment of a fee not exceeding five pounds to the Society, it shall be the duty of the Society as registrar to cause the name of the person admitted to be entered on the roll of solicitors.

*As to Striking off the Roll*, the Act provides (sect. 12) that for the purpose of hearing any application to strike a solicitor off the roll of solicitors, or an application to require a solicitor to answer allegations contained in an affidavit, the Master of the Rolls shall appoint a committee (in the Act called "the committee") of not less than three nor more than seven of the members of the council of the Society (with power from time to time to remove any member from the committee, or fill any vacancy in the committee, or add to its members, provided that the number shall not exceed seven, nor be less than three), and

<sup>(1)</sup> The powers and jurisdiction of the Master of the Rolls, or any judge of the High Court of Justice, possessed by him over solicitors before the passing of the Act are expressly preserved. 51 & 52 Vict. c. 65, s. 19.

<sup>(2)</sup> The enactments of the Act with respect to the production and entry of articles apply to fresh articles under sect. 13 of the Solicitors Act, 1843, in the same manner as they apply to the original articles.

no application shall be heard before less than three members of the committee.

The Solicitors Act,  
1888.

Applications to strike the name of a solicitor off the roll of solicitors (whether at the instance of the solicitor himself or of any other person), or an application to require a solicitor to answer allegations contained in an affidavit, are to be made to and heard by the committee, in accordance with rules to be made under the authority of the Act.

The committee, after hearing the case, are to embody their finding in the form of a report to the High Court of Justice, except where the application is made at the instance of the solicitor himself, in which case the report is to be made to the Master of the Rolls, who is to make such order thereon as he shall think fit. The committee is a kind of grand jury to enquire into the charge<sup>(1)</sup>, and the right to apply to it is not confined to persons injured by the misconduct of the solicitor, but may be exercised by any person who alleges that such misconduct has taken place.

If the committee are of opinion that there is no *primâ facie* case of misconduct against the solicitor, the Society need not take any further proceedings; but if the committee are of opinion that there is a *primâ facie* case, it is to be the duty of the Society to bring the report of the committee before the Court. Such report is to have the same effect, and is to be treated by the Court in the same manner, as a report of a master of the Court; and the Court may make such order thereon as to the Court may seem fit.

It is important to observe that any person who but for the Act would have been entitled to apply to the Court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit, is to be entitled so to apply although the committee is of opinion that there is no *primâ facie* case of misconduct against the solicitor, and is to be entitled to be heard if the Society brings the report of the committee before the Court.

Rules as to procedure before the committee, and generally for the purpose of the execution of the provisions of the Act, may be made, and from time to time altered and revoked, by the Master of the Rolls with the concurrence of the Lord Chancellor and of the Lord Chief Justice of England, or one of them.

The Act gives to the Registrar of Solicitors, subject to an

(<sup>1</sup>) Per Coleridge, C.J., *Re A Solicitor*, 25 Q. B. D. 17, 20, where it was held that the notes of the public ex-

amination of the solicitor signed by him might be used in evidence against him.

The Solicitors Act, 1888.

appeal to the Master of the Rolls, jurisdiction as to the renewal of a solicitor's annual certificate, if a solicitor, who has obtained the registrar's certificate entitling him to practice, neglects for twelve months after the expiration of such certificate to obtain a fresh certificate, and subsequently applies for a fresh certificate.

Notice of the intention to make the application must be given to the registrar at least six weeks before the application is actually made, unless such notice is dispensed with by the registrar or by the Master of the Rolls.

Striking off the rolls.

An application to the committee to strike a solicitor off the roll of solicitors, or to require a solicitor to answer allegations contained in an affidavit, must be in writing under the hand of the applicant, and be sent to the registrar, together with an affidavit by the applicant, stating the matters of fact on which he relies in support of his application.

Every notice of motion to strike off the rolls must state in general terms the grounds of the application, and where any such motion is founded on evidence, by affidavit, a copy of any affidavit intended to be used must be served with the notice of motion <sup>(1)</sup>.

Some important principles of the law with reference to the cases in which the Court will accede to, or refuse applications to strike solicitors off the rolls have been established by recent cases.

It is not an inflexible rule that a solicitor who has been convicted of felony will, as a matter of course, be struck off the rolls.

This principle was applied in a case when a solicitor had been employed as clerk by a firm of solicitors, and had embezzled money belonging to them, and after being suspended by the Court from practice, was subsequently convicted, on precisely the same facts, of embezzlement, and sentenced to imprisonment. The Court of Appeal considered that as all the facts then before the Court, except that of the subsequent conviction, were before the Court when the solicitor was suspended, it would be unfair to punish him again for the same offence by striking him off the rolls <sup>(2)</sup>. An important principle was also laid down by the same Court in another case, viz., that when an order has been made to strike a solicitor off the roll of solicitors for an offence under sect. 32 of the Solicitors Act, 1843, it follows, as an inevitable statutory consequence, that he is for ever after disabled from practising as a solicitor, and

<sup>(1)</sup> R. S. C. O. LII. r. 4.

<sup>(2)</sup> *In re A Solicitor. Ex parte*

*Incorporated Law Society*, 37 W. R. (C.A.) 598.



there is no power in any judge or Court to re-admit him as a solicitor <sup>(1)</sup>.

The attention of the reader will hereafter be directed (p. 952) to the cases in which imprisonment for default in payment of a sum of money under the Debtors Act, 1869 <sup>(2)</sup>, is still retained. Among these cases is that of default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order. It must also be borne in mind that this is one of the two cases in which, under the Debtors Act, 1878 <sup>(3)</sup>, the Court is intrusted with a discretionary power, "a very anxious and delicate discretion," as it has been happily termed, either to grant or refuse either absolutely or upon terms, any application for a writ of attachment, or other process or order of arrest or imprisonment, and any application to stay the operation of any such writ, process, or order, or for discharge from arrest or imprisonment thereunder.

The  
Debtors  
Act, 1878.

A solicitor ordered to pay in his character of an officer of the Court, and making default is liable to be attached, though in the interval he has been struck off the rolls <sup>(4)</sup>, and though a receiving order has been made against him <sup>(5)</sup>.

There are certain cases in which a solicitor must be employed.

Where  
solicitors  
must be  
employed.

A person in prison must employ a solicitor, for it has been decided that the Court will not grant a *habeas corpus* to a party to a suit who is in custody, to enable him to appear in Court merely for the purpose of arguing his case in person <sup>(6)</sup>.

A next friend and a corporation are also under the necessity of employing a solicitor, as they cannot sue in person <sup>(7)</sup>.

Having thus considered the cases in which the services of a solicitor are indispensable, we may next notice by way of contrast the disabilities which their position entails upon them. Solicitors are subject to certain disabilities, the chief of which may here be mentioned.

Disabilities  
of solicitors.

If a solicitor purchases from his client without disclosing to his client that he is purchasing for himself, the sale will be set aside <sup>(8)</sup>. It has also been decided that a solicitor taking a mortgage to himself from his client is not entitled to charge profit

<sup>(1)</sup> *In re Lamb*, 23 Q. B. D. 477.

<sup>(2)</sup> 32 & 33 Vict. c. 62, s. 4.

<sup>(3)</sup> 41 & 42 Vict. c. 54.

<sup>(4)</sup> *Re Strong*, 32 Ch. D. 342.

<sup>(5)</sup> *Re Wray*, 36 Ch. D. 138. See also *Litchfield v. Jones*, 36 Ch. D. 530.

<sup>(6)</sup> *Weldon v. Neal*, 15 Q. B. D. 471.

<sup>(7)</sup> *Cordery on Solicitors*, 2nd ed. p. 50, which see, as to information and *mandamus*.

<sup>(8)</sup> *McPherson v. Watt*, 3 App. Cas. 254.

Gifts from  
clients.

costs for its preparation (1). Another important disability of a solicitor is that he cannot take a gift from his client *inter vivos*. So long as the relation of solicitor and client subsists between the parties this disability is absolute (2). The rule, however, does not apply when the benefit conferred is of trivial amount (3), and it has been held that in the absence of undue influence a solicitor may receive a gift by will (4), and that although he himself has prepared the will under which he benefits.

Solicitor  
trustee.

A solicitor who is a trustee or executor or administrator is not entitled, in the absence of special contract or express direction, to any remuneration in respect of his professional services, and will only be allowed costs out of pocket (5). It has been held, however, that if a solicitor trustee, who is a member of a firm, employs his partner in the trust business under an agreement that the partner alone shall take all the profits of that particular business, the partner is entitled to his costs (6). An exception to the general rule was also established by the well-known case of *Craddock v. Piper* (7), and the law now is that where a solicitor trustee acts on behalf of himself and his co-trustee in an action, or even in friendly proceedings, the solicitor or his firm may receive the usual charges if there have been no greater costs incurred than if the work had been for the co-trustee alone. A clause is usually inserted in the instrument creating the trust, enabling any trustee who is a solicitor to charge for all business of whatever kind not strictly professional, but which might have been performed in person by a trustee not being a solicitor; but it has recently been decided that this clause ought not to be inserted by a solicitor in an instrument drawn by himself, unless the testator has expressly instructed him to insert these very words (8).

An Act passed in 1871 (9) while removing the disqualification of solicitors to act as justices of the peace, provides that no

(1) *Re Roberts*, 43 Ch. D. 52, see *Field v. Hopkins*, 44 Ch. D. 524; *Re Wallis*, 25 Q. B. D. 176.

(2) *Hatch v. Hatch*, 9 Ves. 292; *Billage v. Southee*, 9 Hare, 534; *Tomson v. Judge*, 3 Drew. 306; *Morgan v. Minett*, 6 Ch. D. 638, where the authorities are collected, and see *Mitchell v. Homfray*, 8 Q. B. D. 587.

(3) *Rhodes v. Bate*, L. R. 1 Ch. 252.

(4) *Walker v. Smith*, 29 Beav. 394; *Hindon v. Weatherill*, 5 D. M. & G.

301.

(5) See the cases on this subject reviewed in *Re Corsellis*, 34 Ch. D. 675; and see notes thereto, Brett's *Leading Cases in Equity*.

(6) *Clack v. Carlon*, 7 Jur. (N.S.) 441.

(7) 1 Mac. & G. 664, and see *Re Corsellis*, *ubi supra*.

(8) *Re Chapple. Newton v. Chapman*, 27 Ch. D. 584, 587.

(9) 34 & 35 Vict. c. 18.

person shall be capable of becoming or being a justice of the peace for any county in England or Wales (not being a county of a city or county of a town), in which he shall practise and carry on the profession or business of an attorney, solicitor or proctor; and where any person practises and carries on such profession or business in any city or town, being a county of itself, he shall for the purpose of this Act, be deemed to carry on the same in the county within which such city or town or any part thereof is situate <sup>(1)</sup>. Among other disabilities of solicitors may be mentioned that a solicitor who is a member of a firm acting for the plaintiff ought not to be appointed receiver <sup>(2)</sup>. A solicitor of the tenant for life ought not to be appointed a trustee for the purposes of the Settled Land Act <sup>(3)</sup>. A solicitor is not permitted to give security for his client, and the Rules of the Supreme Court, 1883 (Order XII. r. 21) provide that "no commissioner shall take bail on behalf of any person for whom he or any person in partnership with him is acting as solicitor or agent," and (Order XXXVIII. r. 16) that no affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor.

Solicitors  
as justices  
of the  
peace.

Any solicitor wilfully and knowingly acting as agent for an unqualified person in any action, &c., or in any matter in bankruptcy shall be struck off the roll, and for ever after disabled from practising as a solicitor, and the unqualified person shall be committed to prison for a term not exceeding one year.

Disabilities  
of solicitors.

A solicitor acting under a mere general authority has authority to defend an action, but not to bring one without special retainer. He has also power to waive irregularities in an action, to refer to arbitration and to compromise actions, unless expressly forbidden <sup>(4)</sup>.

He has also authority to make formal admissions which bind his client, and it is his duty to see that they are in writing.

A solicitor is liable to be attached:—

Liability  
to attach-  
ment.

1. In cases where having been served with an order against his client for interrogatories, or discovery, or inspection, he neglects without reasonable cause to give notice thereof to his client;

<sup>(1)</sup> A Bill was introduced (Session 1890) to remove this disability.

<sup>(2)</sup> *Re Lloyd*, 12 Ch. D. 447.

<sup>(3)</sup> *Re Kemp*, 24 Ch. D. 485

<sup>(4)</sup> *Cordery on Solicitors*, 2nd ed. p. 76 *et seq.* The client is not, however, bound by the fraud of a solicitor: see *Williams v. Preston*, 20 Ch. D. 672,

where a solicitor put in a fraudulent defence without his client's knowledge, and leave was given to set aside the judgment which had been signed and withdraw the defence. The Court of Appeal reheard the case, and dismissed the action with costs.

2. When he makes default in entering an appearance, &c., pursuant to his written undertaking <sup>(1)</sup>.

The important subject of the remuneration of solicitors may next be considered.

Remunera-  
tion.

Solicitors can only claim remuneration for their services subject to the provisions of certain statutes, but it must be borne in mind that these statutes only apply to business "connected with the profession of a solicitor, business in which the solicitor was employed because he was a solicitor, or in which he would not have been employed if he had not been a solicitor" <sup>(2)</sup>.

The reader's attention may now be directed to the chief enactments bearing on the subject of solicitors' remuneration.

A solicitor cannot commence an action for the recovery of any fees, charges, or disbursements until one calendar month after sending in a signed bill or a bill enclosed in or accompanied by a signed letter <sup>(3)</sup>. A judge of the superior Courts has, however, power in certain cases specified in the Act, viz. where it is proved to his satisfaction that the party chargeable is about to quit his house and become a bankrupt, or take any other step which may defeat payment <sup>(4)</sup>, to authorize an action on taxation before the expiration of the month. An order for taxation of the bill may be obtained as a matter of course within a month, and in certain cases within twelve months.

The form of order under Order xiv. r. 1 (*ante*, p. 724), in an action upon a solicitor's untaxed bill of costs, where the defendant admits the retainer and work done, and only disputes the propriety of the charges, was settled by the Court of Appeal as follows: "It is ordered that the bills of costs on which this action is brought be referred to the taxing master, pursuant to the statute 6 & 7 Vict. c. 73, and that the plaintiff give credit at the time of taxation for all sums of money received by him from or on account of the defendant. And let the plaintiff be at liberty to sign judgment for the amount of the master's allocatur in the said taxation and costs to be taxed" <sup>(5)</sup>.

Under "special circumstances" taxation may be ordered after

<sup>(1)</sup> R. S. C. 1883, O. xxxi. r. 23; O. xii. r. 18.

<sup>(2)</sup> *Allen v. Aldridge*, 5 Beav. 401.

<sup>(3)</sup> 6 & 7 Vict. c. 73, s. 37. See Morgan and Wurtzburg on Costs, p. 426.

<sup>(4)</sup> The Legal Practitioners Act, 1875 (38 & 39 Vict. c. 79), s. 2. Applications (except for orders of course) for delivery and taxation of

bills are made by originating summons: R. S. C., 1883, O. lv., r. 2. In a case where a petition was needlessly presented, only the costs of a summons were allowed. *Re Kellock*, 56 L. T. Rep. (N.S.) 887; 35 W. R. 695.

<sup>(5)</sup> *Smith v. Edwards*, 22 Q. B. D. 10.

payment, but the application for the reference to taxation must be made within twelve calendar months after payment.

If a sixth is taxed off the bill the solicitor must pay the costs, but if less than a sixth be taxed off the costs fall on the party chargeable with the bill. Taxation  
of costs.

It has been decided by the Court of Appeal that "special circumstances," within the meaning of this Act, are not merely pressure and overcharge, or overcharge amounting to fraud, but that a judge has a discretion to order the bill of costs to be taxed, if it contains items unreasonably large, or charges requiring explanation, or gross blunders <sup>(1)</sup>.

Payment of the bill in no case precludes taxation if there be special circumstances to warrant it, provided the application be made within twelve calendar months after payment.

It has been decided <sup>(2)</sup> that the retainer and employment of a solicitor in such a matter as a bankruptcy, an administration, or a winding-up, does not constitute a "single and entire" contract so as to deprive the solicitor of his right to payment, except for costs out of pocket, till the whole matter is completed, and successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery.

The principle on which the law is based was admirably stated by the late Sir George Jessel in the following terms:—"If a man engages to carry a box of cigars from London to Birmingham, it is an entire contract, and he cannot throw the cigars out of the carriage half-way there, and ask for half the money; or if a shoemaker agrees to make a pair of shoes, he cannot offer you one shoe, and ask you to pay one-half the price. That is intelligible. In my opinion, in the case of a solicitor, there is not an implied contract of that kind. It bears no fair relation to the doctrine of entire contract. It is a series of services which, though nominally in relation to one matter, is, in reality, in relation to a succession of matters, and it is not within the doctrine of entire contract, because it is not within the mischief of it. It is not reasonable that a solicitor should engage to act on for an indefinite number of years, winding up estates, without receiving any payment on which he can maintain himself" <sup>(3)</sup>.

(1) *In re G. B. B. Norman*, 16 Q. B. D. 673, where *Re Boycott*, 29 Ch. D. 573, is commented upon, and see *Re Pybus*, 35 Ch. D. 568.

(2) *In re Hall & Barker*, 9 Ch. D. 538, 545.

(3) See as to the taxation of agency bills, *Re Nelson, Son, & Hastings*, 30 Ch. D. 1: *Re Johnson & Weatherall*, 37 Ch. D. 433, affirmed 15 App. Cas. 203. In the latter case it was laid down that the Court has inherent

Conditional  
bill of  
costs.

It has been held by the Court of Appeal, that a solicitor may send in a conditional bill of costs, or alter it, provided the condition is fully and clearly stated to the client. If, however, the solicitor has sent in his bill without any condition, or with a condition which he could not fairly impose, he cannot afterwards withdraw it or send in an amended bill <sup>(1)</sup>.

Special  
agree-  
ments.

Special agreements as to solicitors' remuneration may be made under the Solicitors Act, 1870, and the Solicitors' Remuneration Act, 1881.

The former Act provides that "a solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such solicitor, whether as solicitor or as an advocate, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated" <sup>(2)</sup>.

The amount which is payable under such an agreement cannot be received by the solicitor until it is allowed by the taxing-master or approved by the Court. The meaning of section 4 of the Attorneys and Solicitors Act, 1870, is that a solicitor may make what agreement he likes with his clients, but he is not to receive any payment under it unless the taxing master considers it fair and reasonable; and if he does not consider it so, he may require the opinion of the Court or judge to be taken on it" <sup>(3)</sup>.

The agreement must be in writing, signed by both parties <sup>(4)</sup>.

Under these Acts, a solicitor may take security for future costs in contentious and non-contentious business.

Solicitors'  
Remunera-  
tion Act,  
1881.

The last Act dealing with the subject of the remuneration of solicitors is the Solicitors' Remuneration Act, 1881, by which the remuneration of solicitors in non-contentious business is chiefly governed. The object which the legislature had in view in passing this Act has been well stated as follows:—

"The Solicitors' Remuneration Act, 1881, was passed and the Royal assent was given to it on the very day, the 22nd of

jurisdiction to order taxation of part of an agent's bill. But the Court will only exercise its jurisdiction on terms which will preclude any injustice to the agents; and see as to taxation of statute barred debts, *Curwen v. Milburn*, 42 Ch. D. 424.

<sup>(1)</sup> *In re Thompson*, 30 Ch. Div. 441; and see *Re Heather*, L. R. 5 Ch.

694; *Re Kellock*, 56 L. T. Rep. (N.S.) 887; 35 W. R. 695. Morgan and Wurtzburg on Costs, p. 432.

<sup>(2)</sup> 33 & 34 Vict. c. 28, s. 4.

<sup>(3)</sup> Per Jessel, M.R., *Anon.*, 1 Ch. D. 573; see *Re Inderwick*, 54 L. J. Ch. 72; *Re Palmer*, 59 L. J. Ch. 575; *Mearns v. Knapp*, 37 W. R. 585.

<sup>(4)</sup> *Re Lewis*, 1 Q. B. D. 724.

August, 1881, on which the Royal assent was given to another Act of Parliament, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which curtailed very much indeed, as it was intended to do, the length of conveyancing instruments. Up to that time the remuneration of solicitors for conveyancing business was calculated at so much per folio, and of course when an Act was passed curtailing the length of conveyancing documents, if the remuneration had been thereafter calculated upon the old scale, the remuneration of solicitors would have been decreased, while at the same time the attention and care requisite for the settling of such documents might be very much increased. Therefore, the obvious intention of the legislature in passing the statute was to provide a different scale for calculating the remuneration of solicitors, so that it might not be unduly decreased by the change that was to take place simultaneously in the length of conveyancing documents" (1).

Solicitors' Remuneration Act, 1881, and General Order.

The General Order which came into operation on the 1st of January, 1883, provides in Part I. of Schedule I. for an *ad valorem* scale of charges on sales, purchases and mortgages, and in part ii. of the same Schedule a scale of charges as to leases and agreements for leases, at rack-rent, other than mining leases or agreements for building leases. All business not provided for by the first Schedule is to be regulated by the system prevailing on the 1st of January, 1883, as altered by Schedule II.

By the General Order (sect. 7) under the Solicitors' Remuneration Act, 1881, s. 5, a solicitor is entitled to interest at 4 per cent. on his disbursements and costs, whether by scale or otherwise after one month from demand from the client (2).

A solicitor may, before undertaking any business, by writing under his hand elect that his remuneration shall be according to the old system as altered by Schedule ii., but in the absence of election his remuneration is to be according to the scale prescribed by the order.

The cases which have been decided upon this Act and Order, are extremely numerous, and we can only refer the reader to the various works in which they are collected. The working of the new system may, however, be illustrated by a few of the more striking cases. In one case, which attracted much attention, the Court of Appeal had proceeded on the principle that if the scale did not apply, no other remuneration should be

(1) Per Kay, J., in *Stanford v. Roberts*, 26 Ch. D. 155.

(2) *Blair v. Cordner*, 19 Q. B. D. 516.

Solicitors' Remuneration Act, 1881, and General Order.

recoverable, and as the commission of an auctioneer had been paid by the client, their decision was that the solicitor was not entitled to recover anything on account of his services. The House of Lords decided that this circumstance did not deprive the solicitor of all remuneration for work done, but that he was entitled to a remuneration on the principle of *quantum meruit* for such work. The Lord Chancellor, in delivering judgment said :

“ The scheme of the Statute and of the General Order appears to me to be intelligible enough, that in respect of certain specific business which may or may not vary in the amount and degree of care and experience required in the performance of it, but as to which it is possible for the Court beforehand to prescribe what shall be a reasonable amount for such business so done,— that in respect of all such business coming within the scale which is by the statute and by the general order applied to such business, that shall be the amount of remuneration which shall be recoverable. The Statute did not mean, and the General Order did not purport to enact, that those scales shall be exhaustive ” (1).

In the case of *Ex parte Mayor of London* (2), the Corporation of London had resolved to purchase at a price of over £90,000, the buildings and site of the old Bankruptcy Court, which was vested in the Public Works Commissioners, to be appropriated to such purposes as the Lord Chancellor should direct. All that the solicitor did, was to consider the Act of Parliament which vested the property in the vendors, and he accordingly required a written formal authority from the Lord Chancellor himself. He then satisfied the chief clerk that there was no necessity for a formal investigation of title, and the purchase was completed. The Court decided that there had been “ an investigation of title ” within the terms of the General Order, and that therefore the scale charges, which in this case amounted to over £270, were payable.

The scale charge does not apply to a sale of land not situated in England. Thus, where an English solicitor carried out a sale under Lord Ashbourne's Act, the Purchase of Land (Ireland) Act, 1885, of land in Ireland belonging to a client, and employed an Irish solicitor to do so much of the work as had necessarily to be done in Ireland, it was held that the English solicitor's remuneration was not regulated by Sched. I. Part I. to the General Order under the Solicitors' Remuneration Act, 1881 (3).

(1) *Parker v. Blenkhorn, Newbould v. Bailward*, 14 App. Cas. 1; and see *Burd v. Burd*, 40 Ch. D. 628.

(2) 34 Ch. D. 452.

(3) *In re Greville's Settlement*, 40 Ch. D. 441.



In a recent case <sup>(1)</sup> where a solicitor did nothing more than mention to a borrower the name of a client of his as likely to lend, and a mortgage was arranged without further action on the part of the solicitor, who then acted for both parties in the matter of the mortgage, it was held, that the solicitor was not entitled to a negotiating fee.

A solicitor is entitled to a lien on all deeds, papers, documents, and on articles delivered to him for a special purpose, *e.g.* to be exhibited to witnesses <sup>(2)</sup>. Among exceptions from the solicitor's lien it may be noticed that there is no lien on a client's will, or on property or paper, which he receives in another character, *e.g.* as steward of a manor, trustee, or mortgagee.

Solicitor's  
lien.

The Court has a discretionary power to create a charge upon property "recovered or preserved" when "meritorious services of the solicitor have resulted in such recovery or preservation" <sup>(3)</sup>. Section 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 127), provides that, "in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter or proceeding in any court of justice, it shall be lawful for the Court or judge to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property (recovered or preserved) of whatsoever nature, tenure or kind the same may be." The section also provides that the Court or judge may make orders for taxation of and for raising and payment of such costs, charges, and expenses out of the property, and that all conveyances and acts done to defeat or which shall operate to defeat such charge or right shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void. There is, however, a proviso that "no such order shall be made by any Court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations" <sup>(4)</sup>.

Statutory  
charge.

A marked difference exists between the lien which a solicitor has upon a fund realised in an action and the lien which he has upon his client's papers, &c. The lien upon the fund extends only to the costs of the particular action under which

<sup>(1)</sup> *In re Eley*, 37 Ch. D. 40.

<sup>(2)</sup> *Friswell v. King*, 15 Sim. 191.

<sup>(3)</sup> Per Lord Selborne sitting as Master of the Rolls in *Pinkerton v. Easton*, L. R. 16 Eq. 490; and see *Emden v. Carte*, 19 Ch. D. 311; *Greer*

*v. Young*, 24 Ch. D. 545; *Ross v. Buxton*, 42 Ch. D. 190; *Moxon v. Sheppard*, 24 Q. B. D. 727; *Keeson v. Luzmoore*, 61 L. T. 199; *Rowley v. Southwell*, 61 L. T. 805.

<sup>(4)</sup> *Baile v. Baile*, L. R. 13 Eq. 497.

the fund arises; but the solicitor is entitled to enforce it actively. The lien on deeds and papers, &c., of the client extends to all professional costs, but cannot be actively enforced.

A solicitor, even though he had acted for the parties to an administration action, will not, on a change of solicitor, be allowed to assert his lien so as to embarrass the proceedings <sup>(1)</sup>.

Conveyancing Act, 1881, and Trustee Act, 1888.

The provisions of the Conveyancing Act, 1881, and the Trustee Act, 1888, which have special reference to solicitors, must also here be noticed. Sect. 8 of the Conveyancing Act, 1881, provides that on a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

Sect. 56 of the Conveyancing Act, 1881, provides that where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

It was decided, however, that this section <sup>(2)</sup> did not generally apply to cases where the vendors were trustees. This difficulty has however been obviated by the following provisions in the Trustee Act, 1888 <sup>(3)</sup>:—"It shall be lawful for a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration or property receivable by the trustee under the trust by permitting such solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in the fifty-sixth section of the Conveyancing and Law of Property Act, 1881; and no trustee shall be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the

<sup>(1)</sup> *Belaney v. Ffrench*, L. R. 8 Ch. 918; *Re Boughton*. *Boughton v. Boughton*, 23 Ch. Div. 169, and see *In re Capital Fire Insurance Association*, 24 Ch. Div. 408, as to solicitor's lien on a winding-up; and see as to set-off not being interfered with by lien: *Pringle v. Gloag*, 10 Ch. D. 676;

and see *Macfarlane v. Lister*, 37 Ch. Div. 88.

<sup>(2)</sup> *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592.

<sup>(3)</sup> 51 & 52 Vict. c. 59, s. 2.

producing of any such deed by such solicitor shall have the same validity and effect, by virtue of the said fifty-sixth section, as the same would have had if the person appointing such solicitor had not been a trustee." The section however contains a proviso that nothing therein contained shall exempt a trustee from any liability which he would have incurred if the Act had not passed, in case he permits such money, valuable consideration, or property to remain in the hands or under the control of the solicitor appointed for a longer period than is reasonably necessary. It has been decided that, "The person producing the deed must be a solicitor acting for the party to whom the money is expressed to be paid" <sup>(1)</sup>.

Trustee  
Act, 1888.

A point of a good deal of importance with regard to the duties of solicitors, was decided in a recent case, in which the question was as to the liability of trustees, for having lent money on mortgage on a security, which turned out to be insufficient, a subject on which the law has since been altered (see *ante*, p. 524). The trustees had accepted the suggestion of their solicitor that they should take the opinion of a particular surveyor. The Court decided that the trustees were liable, as the choice of a valuer for trustees is not part of the ordinary business of a solicitor.

Choice of  
valuer.

The ordinary course of business, it was stated in this case, is that the solicitor should submit a name or names of valuers to the trustees, tell them everything which the solicitor knows to guide their choice, but to leave the choice to them. As this had not been done in the present case, the trustees were held liable <sup>(2)</sup>.

See, as to the privilege of Barristers and Solicitors, *post*, p. 878, *et seq.*

The general rule, as laid down in a well-known case by Chief Justice Tindal, is that a solicitor is liable for the consequences of ignorance or non-observance of the rules of practice; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; whilst on the other hand "he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession of the law" <sup>(3)</sup>.

Liability of  
solicitors.

<sup>(1)</sup> *Day v. Woolwich Equitable Building Society*, 40 Ch. D. 491.

<sup>(2)</sup> *Godefroy v. Dalton*, 6 Bing. 460.

<sup>(3)</sup> *Fry v. Tapson*, 28 Ch. D. 268.

Authori-  
ties.

The reader who desires further information on the difficult and important law affecting solicitors, is referred to Cordery on Solicitors, 2nd edition ; Seton on Decrees, p. 604, *et seq.* ; Brett's Leading Cases in Equity, notes to *McPherson v. Watt* ; *Greer v. Young* ; *Re Corsellis*. *Lawton v. Elwes*. Morgan and Wurtzburg on Costs, pp. 385, 426, *et seq.* As to the costs to which a solicitor is entitled when himself a litigant, see *London Scottish Benefit Society v. Chorley*, 13 Q. B. D. 872 ; as to when a purchaser is affected with notice by reason of the knowledge of his counsel or solicitor, *ante*, p. 93 ; as to agency costs, *Ward v. Lawson*, 43 Ch. D. 153 ; as to remuneration of solicitor trustee in bankruptcy, *Re Wayman*, 24 Q. B. D. 68 ; as to employment of solicitor by trustee in bankruptcy, 53 & 54 Vict. c. 71, s. 15 (3) ; as to appeal to Court of Appeal against order striking solicitor off the rolls, *Re Eede*, 25 Q. B. D. 228.

## BOOK VII.

### EVIDENCE.

#### CHAPTER I.

##### PRINCIPLES AND RULES OF EVIDENCE.

The portion of our work at which we have now arrived is concerned with the principles of evidence. The law with regard to the subject of evidence is of very considerable difficulty and complexity, as witness the 1600 pages which have been devoted by Mr. Pitt-Taylor to a treatment of its principles, the 1170 pages of Mr. Roscoe's work on the Law of Evidence at *Nisi Prius* <sup>(1)</sup>, and Mr. Best's treatise extending to over 600 pages. It is, however, also a subject not only of very great importance, but also of much symmetry, beauty, and interest. "The English system of judicial evidence," says Mr. Best, "is on the whole a noble one, and may fearlessly challenge comparison with others. Its principal features stand out in strong and fine relief, whilst its leading rules are based on the most indisputable principles of truth and common sense." And the author, to whose work we have first alluded, concludes his learned treatise with justifiable enthusiasm by citing with but slight qualification the description of it given by one of our greatest orators: "The principles of the law of evidence are founded on the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life" <sup>(2)</sup>.

(1) In both cases exclusive of index, &c., &c.

(2) Taylor on Evidence, citing Erskine, 24 How. St. Tr. 966. The word "evidence," as pointed out by Mr. Best, originally signifies what is plain, apparent, or notorious, and is applied "by an almost peculiar intention of our language, to that which tends to render evident or to generate proof," and he cites with approval Bentham's definition of evidence "as any matter of fact, the effect, tendency, or design of which is, to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of

fact." The law of evidence, says Mr. Justice Stephen, after adopting Bentham's celebrated division of law, which we have previously mentioned, (*ante*, p. 358) into substantive and adjective law, is that part of the law of procedure which, with a view to ascertain individual rights and liabilities in particular cases, decides: (1) What facts may, and what may not be proved in such cases; (2) What sort of evidence must be given of a fact which may be proved, and (3) by whom and in what manner the evidence must be produced by which any fact is to be proved.

What is  
evidence ?

What, then, is evidence in the legal sense of the term? The word "evidence," considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. It must be borne in mind that nothing but mathematical truth is capable of demonstration. With regard to all matters of fact, the highest point at which we can arrive is that there is no reasonable doubt on the subject. To us, as a great thinker <sup>(1)</sup> has said, "probability is the very guide of life," and the criticism to be applied is, not whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth. In other words, the facts must be proved by competent and satisfactory evidence <sup>(2)</sup>.

Competent evidence is that which the law requires, as the fit and appropriate proof in the particular case, such as the production of a writing where its contents are the subject of inquiry.

Satisfactory evidence is that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt.

The question of the competency or admissibility of evidence is one solely for the judge. "The laws of evidence," it was well said, "as to what is receivable or not, are founded on a compound consideration of what, abstractedly considered, is calculated to throw light on the subject in dispute, and of what is practicable. Perhaps, if one lived to the age of a thousand years, instead of sixty or seventy, it might throw light on any subject that came into dispute, if all matters which could by possibility affect it were severally gone into, and inquiries carried on from month to month as to the truth of everything connected with it. I do not say how that would be, but such a course is found to be impossible at present" <sup>(3)</sup>. The question of the sufficiency of evidence is solely for the jury.

Primary  
and second-  
ary rules.

The rules regulating the admissibility and effect of evidence are divided by Mr. Best into two classes, primary and secondary; the primary relating to the thing to be proved (*quid probandum*), the latter to the mode of proving it (*modus probandi*).

Primary  
rules.

The primary rules of evidence are three in number:—

1st. That the evidence adduced must be directed solely to the matters in dispute, or, as they are generally termed, the points at issue between the parties.

2nd. That the burden of proof lies on the party who would be defeated, supposing evidence were not given on either side;

<sup>(1)</sup> Butler's Analogy.

<sup>(2)</sup> *Attorney-General v. Hitchcock*,

<sup>(3)</sup> Taylor on Evidence, citing 11 Jurist, 478.  
Greenleaf.

and, 3rd, That it is sufficient for a party on whom the burden of proof lies to prove the substance of the issue raised. Primary rules.

Let us consider these various rules in their order:—

1st rule. The evidence must be directed to the point at issue.

“Of all rules of evidence,” says Mr. Best, “the most universal and the most obvious is this, that the evidence adduced should be alike directed and confined to the matters which are in dispute, or which form the subject of investigation.”

The great bulk of the law of evidence, Mr. Justice Stephen tells us, is chiefly a system of negative rules declaring what is *not* evidence, and the doctrine that all facts in issue and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of, and gives unity to all these express negative rules.

2nd rule. The burden of proof lies on the party who substantially asserts the affirmative of the point at issue, unless the law makes a presumption in his favour.

We shall have occasion hereafter to speak more fully on the subject of presumption, but for the present it will suffice to say that presumptions are divided into two classes: Presumptions of law, which consist of rules which in certain cases forbid or dispense with any ulterior inquiry; and presumptions of fact. Presumptions of law again are divided into conclusive and disputable.

The Judicature Rules provide that neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

The illustration given of this is the consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration “as a substantive ground of claim” (1).

The practical test for discovering on whom the burden of proof rests is to ask the question which of them would succeed if no evidence at all were forthcoming (2).

3rd rule. That it is sufficient for the party on whom the burden of proof lies, to prove the substance of the issues raised (3).

This rule, as Mr. Best tells us, is based on the principle which runs through every rational system of jurisprudence,

(1) R. S. C. 1883, O. xix., r. 25.

(2) Taylor on Evidence, 8th ed., p. 341, and see p. 343 *et seq.* for exceptions. The same principle was expressed in the maxim of the Roman law “*Et incumbit probatio qui dicit non qui negat.*”

(3) See also Taylor on Evidence, part ii. chap. i., where the rules governing the production of evidence are analysed on a different plan, without distinguishing between the thing to be proved and the mode of proof.

*Lex rejicit superflua*, "the law rejects that which is superfluous," and no better illustrations can be given than those selected by the same writer, viz. if an action be brought on a bond, and the pleadings had stated that it was paid on the day it was due, it would suffice to show that it had been paid before the day. In actions in respect of contracts and torts a party may recover though the evidence may only prove a lesser amount due in the one case and a substantial portion of the injury complained of in the other.



## CHAPTER II.

## MODE OF PROOF.

Passing on now to what Mr. Best calls the secondary laws of evidence which relate to the *modus probandi*, or mode of proving those matters which require proof, we may first direct the readers to that which is probably the most important of them all, viz., that the law proceeds generally upon the principle that the best evidence, or rather the highest kind of evidence must be given of which the nature of the case admits.

Secondary  
rules of  
evidence.

“The judges and sages of the law,” said Lord Hardwicke, in a celebrated case, “have laid it down that there is but one general rule of evidence the best that the nature of the case will admit. The great instances of the application of this rule are stated by Mr. Best to be : (1) that the judge and jury must decide, not on their own personal knowledge, but should hold themselves in a state of legal ignorance until the matter in dispute is established by proper testimony; (2) that there should be an open and visible connection between the fact to be proved and the evidence in support of it, and (3) that all evidence shall be rejected which shews on its face that better evidence is in the possession of the party.

It is important to bear in mind that the counterpart of a deed is admissible as original or primary evidence against the party executing it, and those claiming under him. So also is a duplicate original. Printed copies “struck off in one common impression,” are primary evidence each of the other’s controversy, though only secondary evidence of the original from which they are printed. <sup>(1)</sup>

The cases in which secondary evidence of the contents of documents are admissible fall, according to Mr. Taylor, under the following heads <sup>(2)</sup> : first, when the original writing is destroyed

<sup>(1)</sup> Roscoe on Evidence, p. 3; Taylor on Evidence, 8th ed. p. 387, citing *R. v. Watson*, 32 How. St. Tr. 82, *et seq.*; 2 Stark. 129, a case in which a number of important points of evidence were raised.

<sup>(2)</sup> Taylor, 8th ed. p. 396. The production of secondary evidence on the *voir dire* (which was a sort of pre-

liminary examination by the judge in which the witness was required to speak the truth with respect to the questions put to him; when, if incompetency appeared from his answers, or was established by evidence, his testimony was rejected : Best on Evidence, 7th ed. p. 131) is here omitted as being practically obsolete.

Secondary evidence of documents where admissible.

or lost; secondly, when its production is physically impossible, or at least highly inconvenient; thirdly, when the document is in the possession of the adverse party, who refuses after notice, and in some cases without notice, to produce it; fourthly, when it is in the hands of a third party, who is not compellable by law to produce it, and who being called as a witness with a *subpœna duces tecum*, relies upon his right to withhold it; fifthly, when the law raises a strong presumption in favour of the existence of the document; sixthly, when the papers are voluminous, and it is only necessary to prove their general results.

1. When the original writing is destroyed or lost. In this case it must be shown to the satisfaction of the judge that a sufficiently diligent search has been made in the place or places where the document, if in existence, would likely have been found. What is a sufficient degree of diligence varies with the nature of the document.

Thus in a case where it was desired to give secondary evidence of a policy of insurance, it was proved that it had been effected some years before; that it had become useless, as a second policy had been effected, and that the probability was that it had been returned to the plaintiff. Under these circumstances, evidence that the plaintiff's solicitor had searched the plaintiff's house in every place pointed out by the plaintiff, and in every place wherever a paper was likely to be put, was held sufficient to allow secondary evidence<sup>(1)</sup>. When it is the duty of the party in possession of a document to deposit it in some public office or particular place, proof of search in that place will be generally sufficient<sup>(2)</sup>. Where there are several places where a document might be placed, all should be searched, but it is not necessary that the search should be recent, or made expressly for the purposes of the action.

2. When its production is physically impossible, or at least highly inconvenient. On this principle secondary evidence has been admitted of inscriptions on walls and fixed tables, mural monuments, gravestones, surveyors' marks on boundary trees, notices warning trespassers affixed on boards. Thus in an oft-quoted case on the subject, secondary evidence of a libel written on the wall of Liverpool gaol was admitted, the Court, proceeding on the principle that, however true the poet's words might be "that stone walls do not a prison make," it would be

(1) *Brewster v. Sewell*, 2 B. & A. 206.

(2) *R. v. Stourbridge*, 8 B. & C. 96.

impossible, or at least highly inconvenient, to order the production of the original evidence.

Secondary evidence of documents where admissible.

3. When the document is in the possession of the adverse party, who refuses after notice, and in some cases without notice, to produce it.

4. When the document is in the hands of a third party, who is not compellable by law to produce it, and who being called as a witness with a *subpoena duces tecum*, relies upon his right to withhold it <sup>(1)</sup>. It is somewhat doubtful what the notice to produce must contain, or with what degree of minuteness or accuracy it must specify the precise documents intended. In one case a notice to produce letters and copies of letters, and all books relating to the cause, was decided to be too vague. A safe plan is that the notice should definitely specify in writing the documents required. A form to be employed, with such variations as circumstances may require, is given in the Judicature Rules, which also provide that an affidavit of the solicitor or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

5. When the law raises a strong presumption in favour of the existence of the document. On this principle it is not generally necessary that the written appointments of public officers should be produced, but it will suffice to show that the officers in question have acted in their official capacity.

6. When the papers are voluminous, and it is only necessary to prove their general results. On this principle a witness who has examined accounts may be allowed to give evidence as to the general result of such examination, but it has been decided that this principle will not admit the evidence of a witness as to the impression produced upon his mind by a number of letters, as this is a mere matter of opinion.

It must be borne in mind that there are no degrees in secondary evidence. Thus, where a deed itself is lost, oral evidence of the contents may be given even though it be proved that the party giving it has a copy in his possession <sup>(2)</sup>.

A yet stronger illustration is that where it is desired to prove

<sup>(1)</sup> It must be borne in mind that this case only arises when a witness has privilege and relies on it. If a witness is bound to produce documents and does not produce them, then secondary evidence is admissible.

<sup>(2)</sup> A very remarkable illustration of the admission of secondary evidence is that afforded by the case which arose on Lord St. Leonards' will, 1 P. D. 154, *post*, p. 978; and see *Mills v. Millward*, 15 P. D. 20.

the testimony of a deceased person, any person who heard him may give evidence, even though it is proved there is a complete shorthand note in existence.

Circum-  
stantial  
evidence.

A division of evidence which it is important to bear in mind is that into direct and indirect, or circumstantial evidence. In the case of direct evidence, the proof applies immediately to the matter to be proved as *factum probandum*, as it is called, without any intervening process. In the case of the latter, the proof applies immediately to collateral facts supposed to be connected nearly or remotely with the point in controversy. Circumstantial evidence may be either conclusive when the connection between the thing to be proved and the evidence of it is a necessary consequence of the laws of nature, or presumptive, when there is only a greater or less degree of probability.

In a case which came before the House of Lords in 1875, where the question of a claim depended entirely under circumstantial evidence as to the pedigree of the various competitors for the title, some of which was obscure and complicated, and ranged over a century and a half of family history, the Lord Chancellor (Lord Cairns) expressed himself on the subject of circumstantial evidence, as follows :

“In dealing with circumstantial evidence, we have to consider the weight which is to be given to the united force of all the circumstances put together. You have a ray of light so feeble, that by itself will do little to elucidate a dark corner. But, on the other hand, you have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and, when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.”<sup>(1)</sup>

In the same case the Lord Chancellor expressed his opinion of the great value of the opposing criticisms of counsel in dealing with a question which turned on circumstantial evidence. “You have,” he said, “the very great advantage of a skilful contradictor and antagonist, who is able, with the best advice, to bring to bear an amount of wholesome criticism which must always be applied to a question of circumstantial evidence before any satisfactory conclusion can be arrived at.”

A very useful warning with regard to the value of circumstantial evidence is given us by Mr. Taylor in his work on Evidence <sup>(2)</sup>. A saying which has frequently received the

<sup>(1)</sup> *Belhaven and Stenton Peerage*,  
1 App. Cas. 279.

<sup>(2)</sup> Taylor on Evidence, Pt. 1,  
ch. iv.

sanction of judicial authority, and has almost passed into a proverb, "witnesses may lie, but circumstances cannot," is one which is often in the last degree dangerous and misleading. If, as Mr. Taylor says, circumstances mean (and they can have no other meaning) those facts which lead to the inference of the fact in issue, they not only can but often do lie. A further circumstance which must also be borne in mind in estimating the value of this kind of evidence is pointed out by the same authority, to wit, that witnesses in giving evidence of this description are more liable to make unintentional misstatements than those who give direct testimony.

## CHAPTER III.

## PRESUMPTIONS—ESTOPPEL.

Different  
kinds of  
presump-  
tion.

Allusion has already been made to the subject of presumptive evidence, which generally is divided into the two heads of presumptions of law and presumptions of fact. Presumptions of law are either conclusive or disputable. Disputable presumptions of law differ from presumptions of fact in three important particulars <sup>(1)</sup>.

Functions  
of judge  
and jury.

(1) The judge is bound to explain to the jury whatever legal presumptions arise from the facts proved; (2) The jury are bound to give full weight to the presumptions so explained; (3) The Court alone, without the intervention of the jury, may draw the proper legal inferences, whenever the requisite facts are developed in the pleadings" <sup>(2)</sup>.

The following are some of the most important presumptions:—Every sane person is conclusively presumed to be acquainted with the law both civil and criminal. The maxim of the law here is *ignorantia juris quod quisque tenetur scire neminem excusat*. Every man is conclusively presumed to intend the consequences of his own acts. Conclusive presumptions are made in favour of judicial proceedings; in favour of legitimacy; in favour of the due execution of ancient deeds, and wills, and documents which prove themselves by their bare production, if they be thirty years old and come from custody of such a nature that their genuineness may be presumed. Instances of disputable presumptions are the presumption in favour of innocence, the presumption in favour of guilt against

<sup>(1)</sup> Taylor on Evidence, 8th ed. p. 132, citing Best on Evidence.

<sup>(2)</sup> With regard to presumptions of fact it is well said by Chief Justice Abbott: "A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. In a great portion of trials, as they occur in

practice, no direct proof that the party accused actually committed the crime is or can be given; the man who is charged with theft is rarely seen to break the house or take the goods; and in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup." 4 B. & Ald. 161.

a man who destroys, withholds, or fabricates evidence; the presumption in favour of acts of an official or judicial character <sup>(1)</sup>.

There is a well-known presumption of law, *Stabitur præsump-tione donec probetur in contrarium*. This maxim, however, must, as Mr. Best points out, be understood with considerable limitation, as it is wholly inapplicable in the case of irrebuttable presumptions where proof to the contrary is excluded and also slight presumptions of fact; and here we are encountered by the doctrine of "conflicting presumptions," with regard to which the same authority has laid down the following propositions <sup>(2)</sup>:—

"Conflict-  
ing pre-  
sump-  
tions.

1. Special presumptions take precedence of general. Thus the general presumption that an owner in fee simple is entitled to minerals is rebutted by the presumption arising from the fact he is not, and that other owners are taking the minerals.

2. Presumptions derived from the course of nature are stronger than casual presumptions. The maxim of the law here is *naturæ vis maxima*, though there be some presumptive evidence. Thus, in favour of a charge, e.g. of robbery, rape, it may be rebutted by showing that the presumption of nature is that the person charged is physically too weak to be guilty of committing the offence charged.

3. Presumptions are favoured which give validity to acts. This rule is to a great extent the equivalent of the maxim *Omnia præsumuntur rite esse acta*.

4. The presumption of innocence is favoured in law. Thus, if there were a contest between the two conflicting presumptions, the presumption in favour of innocence on the one hand, and the presumption in favour of the continuance of life on the other, considerable evidence in favour of the latter would be required in order to turn the scale <sup>(3)</sup>.

Where a person has not been heard of for seven years the

(1) The reader who desires to study the subject of presumptive evidence will find it very fully considered in Taylor on Evidence, part I, chap. v.; Best on Evidence, 7th ed. p. 286. Legal Presumptions were divided by Roman Law into *presumptiones juris et de jure*, when the presumption requires certain things to be taken as true; and *presumptiones juris*, which determine the burden of proof. Presumptions of fact were styled *presumptiones hominis*: see Hunter's

Roman Law, 2nd ed. p. 1058, where it is pointed out that the law may adopt one of the three attitudes, i.e., (1) may be entirely neutral; (2) may direct the judge to believe or disbelieve in the absence of contrary evidence, or (3) may require the judge not to admit evidence.

(2) Best on Evidence, 7th ed. p. 313, *et seq.*

(3) See this subject discussed, Best on Evidence, 7th ed. 316, *et seq.*

presumption is that he is dead, but there is no presumption as to the time when he died <sup>(1)</sup>.

### ESTOPPEL.

And here it will be desirable to notice another exceptional case in which evidence need not be given.

**Definition.** "An estoppel," said Lord Coke, who speaks of the law concerning them as a curious and excellent sort of learning, is "where a man is concluded by his own act or acceptance to say the truth." An estoppel has also been defined to be an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature—so high and so conclusive that the party whom it affects is not permitted to aver against it or offer evidence to controvert it.

**Principle of the law.** The principle on which the law proceeds has been extremely well stated in a standard work <sup>(2)</sup> as follows: "*Interest reipublicæ ut sit finis litium*, but if matters which have been once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion. It is wise, therefore, to provide certain means by which a man may be concluded not from saying the truth, but from saying that that which, by the intervention of himself or his, has once become accredited for truth, is false." And the same learned author proceeds to point out: "The Courts, while favourable to the utility of the doctrine of estoppel, are hostile to the technicality. They have inclined to hold conduct and representations binding, in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered odious."

**Different kinds of estoppel.** Estoppels arise either: (1) By matter of record; (2) By deed; (3) By matter *in pais*.

1. As the record in itself imports truth, "*absolute verity*," it

<sup>(1)</sup> *Re Phene's Trusts*, L. R. 5 Ch. 139. *Re Lewis's Trusts*, L. R. 6 Ch. 356; and see *In re Rhodes*. *Rhodes v. Rhodes*, 36 Ch. D. 586, where the authorities are collected.

<sup>(2)</sup> *Smith's Leading Cases*, vol. ii., see notes to *Duchess of Kingston's Case*, where the learning on the subject

of estoppel is collected; and see *In re Hodgson*. *Beckett v. Ramsdale*, 31 Ch. D. 177; *Concha v. Concha*, 11 App. Cas. 541; *Cambefort v. Chapman*, 19 Q. B. D. 229; *Barton v. London and North Western Railway Co.*, 24 Q. B. D. 77; *Rogers & Co. v. Lambert & Co.*, 24 Q. B. D. 573.



conclusively binds all those against whom it is producible: Thus, if a final judgment be given, the matter, as it is said, *transit in rem judicatam*, and binds the parties and their privies (*i.e.* persons claiming under them). An important proposition must, however, be borne in mind, *viz.*, that, unless a judgment be *in rem*, it cannot act as an estoppel except against the parties and their privies, and that, as was laid down in the celebrated case of *Duchess of Kingston*, fraud is an extensive collateral act which vitiates the most solemn proceedings of a Court of Justice, and the Court when satisfied of such fraud will vacate its own judgment.

Estoppel.

2. With regard to estoppel by deed, the rule of law was stated by Lord Mansfield, that no man should be allowed to dispute his own solemn deed. The doctrine of estoppel by recitals has been already to some extent considered (*ante*, p. 87.) It is pointed out in Smith's Leading Cases <sup>(1)</sup> that in equity statements made in deeds under mistake have been held in recent cases not to estop the parties from showing what the true state of things was, and Sir George Jessel in one case <sup>(2)</sup> said: "I think I ought not to attempt in any way to extend this doctrine, by which falsehood is made to have the effect of truth. The doctrine appears no longer necessary in law; it appears no longer useful, and in my opinion should not be carried further than a judge is obliged to carry it."

It must also be borne in mind in connection with this subject that, by the Judicature Act, 1873, s. 25, sub-s. 11, there is a general provision, that in case of variance between the rules of equity and the rules of common law, the rules of equity shall prevail.

3. The law as to estoppel *in pais* has been stated as follows: "The rule of law is clear with regard to estoppel by matter *in pais*. The rule is that, when one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

"By the term 'wilfully' is to be understood if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real

(1) Smith's Leading Cases, vol. ii. 9th ed. p. 905. See as to action on foreign judgments: *Nouvion v. Freeman*, 15 App. Cas. 1; *Vadala v.*

*Laues*, 25 Q. B. D. 310.

(2) *General Finance, Mortgage, and Discount Co. v. Liberator Permanent Benefit Building Society*, 10 Ch. D. 15.

Estoppel.

intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, the party making the representation would be equally precluded from contesting its truth, and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect." The following illustration is given in the case from which we have just quoted. A retiring partner omitting to inform his customers of the fact in the usual mode that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorized. "A man is not permitted to charge the consequences of his own fault on others, and complain of that which he has himself brought about" (1).

#### MATTERS JUDICIALLY NOTICED WITHOUT PROOF.

Certain matters there are, very numerous and various, which are judicially noticed without proof. Thus, the Courts take cognizance without proof of the common and statute law, the settled practice of conveyancers (not, as Lord St. Leonards tells us, "out of respect for them, but out of kindness to the numerous purchasers who have bought estates under their advice"), the rule of the road on land and at sea.

The Courts also notice the territorial extent of the jurisdiction of their own government and local divisions of the county, so

(1) *Pickard v. Sears*, 6 Ad. & E. 474; *Re Bahia and San Francisco Railway Co.*, L. R. 3 Q. B. 584; *Freeman v. Cooke*, 2 Ex. 663. The law with regard to estoppel by matter *in pais* was very recently considered by the Court of Appeal, in *Re London Celluloid Co.*, 39 Ch. D. 190, when the doctrine was held not to apply, and the following observations made by Lord Blackburn in the House of Lords in *Burkinshaw v. Nicholls*, 3 App. Cas. 1004, cited: "Sometimes there is a degree of odium thrown upon the doctrine of estoppel, because the same word is used occasionally in a very technical sense, and the doctrine of estoppel *in pais* has even been thought to deserve some of the odium of the more technical class of homologation. But, the moment the doctrine is looked at in its true light, it will be found to be a most equitable one, and one without which, in fact, the law

of the country could not be satisfactorily administered. When a person makes to another the representation, 'I take it upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that between those two parties, their right should be regulated, not by the real state of the facts, but by the conventional state of facts which the two parties agree to make the basis of their action; and that is what I apprehend is meant by estoppel *in pais* or homologation": see as to estoppel *in pais*: *Swan v. North British Australasian Co.*, 2 H. & C. 175; 7 H. & N. 603; *Ex parte Swan*, 7 C. B. (N.S.) 400; *Carr v. London and North Western Railway Co.*, L. R. 10 C. P. 307, 316-18.

far as they affect the government, but not the precise positions or boundaries of local divisions. Thus, in one case cited in Taylor on Evidence, the Court refused to take judicial notice that Park Street, Grosvenor Square, in the county of Middlesex, was within twenty miles of Russell Square in the same county, and in another case the plaintiff was non-suited for not proving that the Tower of London was within the city of London.

#### PROOF OF DOCUMENTS.

Many documents of a public character may be proved by copies, which may be of four classes, viz. exemplifications, office copies, examined copies, and certified copies <sup>(1)</sup>.

Exemplification is a certified transcript and official copy under the seal of the Court or public functionary, *e.g.* a copy under the seal of the Probate Division of the High Court. An exemplification is admissible evidence to prove the original document.

With regard to office copies, *i.e.* copies made by the officers having the custody of the documents in question, the Judicature Rules provide that (R. S. C., 1883, Order xxxvii., r. 4), office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters, and between all persons or parties to the same extent as the original would be admissible; and that (Order lxi., r. 7) office copies are sufficiently authenticated if they appear to be stamped with a seal of the Central office.

The English law proceeds upon the principle that every one is presumed to retain in his memory all the provisions of all the public statutes which have ever been enrolled in the statute book. Accordingly, the printed statute book is used not as an authentic copy of the record itself, but as an aid of the memory of that which is supposed to be in every man's mind already <sup>(2)</sup>.

By the 13 & 14 Vict. c. 21, s. 7, it is provided that "every Act made after the commencement of this Act" (Feb. 4, 1851), "shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such Act."

By the 8 & 9 Vict. c. 113, s. 3, it is provided that "all copies of private, and local, and personal Acts of Parliament, not public Acts, if purporting to be printed by the Queen's printers,

<sup>(1)</sup> Roscoe's Nisi Prius Evidence, 15th ed. p. 92.

<sup>(2)</sup> Roscoe's Evidence, 15th ed. p. 99, citing Gilbert's Evidence.

and all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."

Bankers'  
Books Evi-  
dence Act.

The law with regard to the evidence contained in bankers' books has been very materially altered by recent legislation <sup>(1)</sup>. In a case decided by the Court of Appeal, 1887 <sup>(2)</sup>, where the policy of the Act and the history of the law on the subject is considered, attention is drawn to the fact that the legislation was alike for the benefit of bankers and suitors, and aimed at two objects:—

To remedy the serious inconvenience which has been occasioned to bankers, and also to the public, by reason of the ledgers and other account-books having been removed from the banks for the purpose of being produced in legal proceedings, and to facilitate the proof of the transactions recorded in such ledgers and account-books.

The principal provisions of the Act are as follows:—

A copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded.

A copy of an entry in a banker's book shall not be received in evidence under the Act, unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

Such proof may be given by a partner or officer of the bank, and may be given orally, or by an affidavit sworn before any commissioner or person authorised to take affidavits.

A copy of an entry in a banker's book shall not be received in evidence under the Act, unless it be further proved that the copy has been examined with the original entry and is correct.

<sup>(1)</sup> 42 & 43 Vict. c. 11, repealing 39 & 40 Vict. c. 48.

<sup>(2)</sup> *Arnott v. Hayes*, 36 Ch. Div. 731. In this case it was decided that an order giving liberty to inspect a banker's books and take copies of any entries therein for the purposes of legal proceedings may be made under 42 & 43 Vict. c. 11, s. 7, on the application of a party to such proceed-

ings *ex parte*, and without evidence; although generally it is better that notice of the application should be served on the person whose account is to be inspected, and in some cases the Court may require evidence of the *bona fides* of the application, and of the materiality of the inspection; and see *In re Marshfield*, 32 Ch. D. 499.

Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorized to take affidavits.

A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book, the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause.

Provision has been made by the Conveyancing Act, 1881, for the deposit of original documents, creating powers of attorney, and for their inspection and delivery of copies. It is to be borne in mind that a power of attorney (which has been defined as "an authority under seal to a person to do an act in the stead of another"), whether given for value or not, if expressed to be irrevocable, may be made absolutely valid for a fixed period not exceeding a year from its date <sup>(1)</sup>.

Powers of  
attorney.

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<sup>(1)</sup> See Conveyancing Act, 1881, s. 48, and sects. 8 and 9 Conveyancing Act, 1882; see also Conveyancing Act, 1881, ss. 46, 47, which enable the donee of a power of at-

torney to execute any instrument in his own name and with his own seal, and protect persons making payments, &c., in good faith without notice of death, &c.

## CHAPTER IV.

## EVIDENCE ON THE TRIAL OF AN ACTION.

Let us now, having thus far considered some of the general principles of the law on the subject of Evidence, proceed to review some of the points which arise in the ordinary course of proceedings at a trial. And here it will be desirable on the threshold of our subject to at once direct the attention of the reader to certain of the provisions of the Judicature Act and Rules on the subject of Evidence which seem to require particular mention at this point.

Judicature  
Act, 1875.

Sect. 20 of the Judicature Act, 1875, prescribes an important limitation with regard to the alteration of the rules of evidence by the Judicature Rules. It provides that nothing in the Act, or in any rules of Court to be made under the Act, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries.

Order xxxvii. of the Judicature Rules, 1883, is devoted to evidence generally. We shall have hereafter to refer to several of its other provisions, but we must here direct the reader's attention to the all-important rule, Rule 1 of Order xxxvii., which deals with the mode in which evidence is to be taken at the trial of an action.

Mode in  
which evi-  
dence is to  
be taken.

The provisions of that rule are as follows:—In the absence of any agreement in writing between the solicitors of all parties, and subject to these rules, the witnesses at the trial of any action, or at any assessment of damages, shall be examined *vivâ voce*, and in open court. The Court or a judge may, however, at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient

cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that, where it appears to the Court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit <sup>(1)</sup>.

The rules also provide that the Court or a judge may, in any cause or matter, *at any stage of the proceedings*, order the attendance of any person for the purpose of producing any writings or other documents named in the order which the Court or judge may think fit to be produced: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial. Any one disobeying such an order is guilty of contempt, but a witness so summoned is entitled to conduct-money, and expenses as upon attendance at a trial <sup>(2)</sup>.

The duty of a judge presiding at a trial by jury is fourfold: (1) He must decide all questions as to the admissibility of the evidence; (2) He must tell the jury how the evidence is to be weighed; (3) It is for him to determine whether there be *any* evidence at all to be submitted to the jury; (4) He must explain the law applicable to the question to be determined.

Duties of  
the judge.

Thus, to take an illustration put by Lord Cairns: Suppose an action is brought for an injury caused by negligence, "the judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether from those facts, when submitted to them, negligence ought to be inferred." The principle of the law is *ad quæstionem juris non respondent iuratores ad quæstionem facti non respondent iudices* <sup>(3)</sup>.

In our Courts foreign law is a matter of fact to be decided on the evidence of advocates practising in the Courts of the country whose law is to be ascertained, but if the witnesses in their evidence refer to any passages in the code of their country as containing the law applicable to the case, the Court is at

<sup>(1)</sup> Another rule provides with regard to reading affidavit evidence which has been taken in other causes and matters as follows: "An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the Court or a Judge, to be obtained at the time of

making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence:" R. S. C. 1883, Order xxxvii., r. 3.

<sup>(2)</sup> R. S. C. 1883, Order xxxvii., rr. 7, 8, 9.

<sup>(3)</sup> See Broom's Legal Maxims.

liberty to look for itself at those passages and consider what is their proper meaning <sup>(1)</sup>.

Oaths Act,  
1888.

Before a witness can be examined he must either be sworn or make an affirmation. And here we may notice an important change made in the law by an Act which repeals a large amount of previous legislation on the subject, and is to be cited as the Oaths Act, 1888.

Every person upon objecting to be sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath *in all places, and for all purposes*, where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury.

A form of affirmation is given in the Act. It is also provided that the validity of an oath is not to be in any way affected by the absence of religious belief. Any person who desires it may swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland <sup>(2)</sup>.

A witness is first examined in chief, the opposite party is then allowed, unless he chooses to waive his right, to cross-examine, and the witness may then be re-examined by the party calling him, if he thinks it desirable to do so.

Crimi-  
nating  
answers.

Where a witness refuses to answer a question put to him on the ground that his answer will tend to criminate himself, his mere statement of his belief that his answer will have that effect is not enough to excuse him from answering, but the Court must be satisfied from the circumstances of the case, and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to him from his being compelled to answer <sup>(3)</sup>.

The reason of this rule was stated by Sir George Jessel to be that if a witness were allowed merely on his own statement of

<sup>(1)</sup> *Concha v. Murrietta. De Mora v. Concha*, 40 Ch. D. 543. See as to the House of Lords (*ante*, p. 798).

<sup>(2)</sup> 51 & 52 Vict. c. 46, ss. 1, 3, 5; and see *Omychund v. Barker* in the former edition of Smith's Leading Cases, where the old law on this

subject is considered.

<sup>(3)</sup> *Ex parte Reynolds. In re Reynolds*, L. R. 20 Ch. D. 294; *Ex parte Gilbert. In re Genese*, W. N. (1886) 134. And see *Bradley v. Clayton*, 26 L. R. (Ir.) 405.



his belief that an answer to the question would tend to criminate him to refuse to answer, it would enable a friendly witness, who wished to assist one of the parties, to escape examination altogether, and to refuse to give his evidence; and that this would be so great an evil as far to overbear, as a question of public policy, the danger, if it is to be treated as a danger, of occasionally assisting to convict a guilty man out of his own mouth <sup>(1)</sup>.

In certain cases the law requires that the evidence of a witness should be corroborated <sup>(2)</sup>. Thus in cases of treason there must be two lawful witnesses; in criminal trials the evidence of an accomplice must be corroborated; a plaintiff in an action for breach of promise of marriage cannot recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise. Corroborati-  
tion.

It has been settled by a decision of the Court of Appeal, after some confusion in the cases upon the subject, that there is no rule of English law which precludes a claimant from recovering on his own testimony against the estate of a deceased person, although the Court will generally require such corroboration <sup>(3)</sup>.

“The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon” <sup>(4)</sup>.

In the examination-in-chief, “leading questions,” *i. e.* questions which from the form in which they are put are likely to communicate to the witness a knowledge of what answer would be favourable to the person putting; or, which, in other words, “suggest to the witness the answer desired,” are not (subject to the exceptions, which we shall next mention) allowed to be put. “Leading  
questions.”

Leading questions are, however, allowed with regard to introductory matter, and if the witness is obviously hostilely

<sup>(1)</sup> Per Jessel, M.R., in *Ex parte Reynolds*. *In re Reynolds*, L. R. 20 Ch. D. 300.

<sup>(2)</sup> See Taylor on Evidence, chap. xvii., as to matter not provable by a single witness.

<sup>(3)</sup> *In re Hodgson*. *Beckett v.*

*Ramsdale*, 31 Ch. Div. 177, disagreeing with *In re Finch*. *Finch v. Finch*, 23 Ch. Div. 267-271; *Maddison v. Alderson*, 8 App. Cas. 467, 469.

<sup>(4)</sup> Sir J. Hannen in *In re Hodgson*. *Beckett v. Ramsdale*, L. R. 31 Ch. D. 177.

interested for the opposite party, or reluctant to bear testimony, the judge has a discretionary power to allow leading questions <sup>(1)</sup>.

Refreshing  
memory.

A witness is also occasionally allowed to refresh his memory by reference to a written instrument, memorandum, or entry in a book. But in memoranda used for this purpose it is essential that they should have been made by the witness himself, or by some one in his presence, or that he should have examined or checked them while the transaction so recorded was fresh in his memory.

It must be borne in mind, however, that a memorandum so used is not thereby made itself evidence, and accordingly a receipt might be used for this purpose, though itself inadmissible, because wanting a stamp. The document so referred to must be produced, and the opposite party has a right to inspect it, without being bound to put it in evidence <sup>(2)</sup>.

The opinions of witnesses are, subject to the exceptions which shall be hereafter noticed, not admissible as evidence.

Opinion-  
evidence.

"Witnesses," as was said in a case when the previous cases were reviewed <sup>(3)</sup>, "conversant in a particular trade may be allowed to speak to a particular practice in that trade; scientific persons may give their opinions on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than another."

Thus, in the leading case of *Carter v. Boehm* <sup>(4)</sup>, and other cases where the question was whether certain facts ought to have been communicated, the evidence of underwriters on the subject was held to be inadmissible. The Court proceeded on the principle that it is the province of a jury and not of individual underwriters to decide that facts ought to be communicated. "It is," as was said in another case, "not a question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in

<sup>(1)</sup> Roscoe's *Nisi Prius*, 15th ed. p. 167; Taylor on Evidence, 8th ed. p. 1223. If the witness is obviously friendly his cross-examiner cannot go so far as to put into the witness's mouth the very words which he is to echo back again.

<sup>(2)</sup> Roscoe's Evidence, 15th ed. pp. 166, 167.

<sup>(3)</sup> *Campbell v. Richards*, 5 B. & Ad. 846.

<sup>(4)</sup> Smith's Leading Cases, vol. i. The admissibility of expert evidence was established 100 years ago by the decision in *Foulkes v. Chadd*, 3 Doug. 157, where the question was whether the evidence of the great engineer Smeaton could be received as to the cause of the choking up of wells: *Managers of the Metropolitan Asylum District v. Hill and Others*, 47 L. T. (N.S.) 33.

which the diversity might be endless." Such evidence leads to nothing satisfactory, and ought to be rejected.

To this broad principle excluding opinion-evidence, however, certain exceptions have been allowed. Opinion-evidence.

(1) Expert evidence, such as that of medical men, antiquaries, and practical surveyors, is admissible on questions of science, trade, and such matters whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it <sup>(1)</sup>.

(2) Again, opinion-evidence is admitted where the opinion is formed on complicated facts which it would be difficult or impossible to bring before the tribunal which has to try the case: *ex gr.*, in cases of identification of persons, things, or the genuineness of disputed handwriting <sup>(2)</sup>.

In connection with the subject of the opinion-evidence of experts, it should be borne in mind that facts which would not otherwise be admissible as evidence are allowed to be proved if they support or militate against the opinion-evidence of the experts. Thus, in *Palmer's Case*, where the question was whether Cook had been poisoned by strychnine, evidence of the symptoms alleged to exist in other cases of poisoning by strychnine was admitted at the trial.

A few words may now be said on the very important subject of the cross-examination of witnesses—examination *ex adverso*, as it is sometimes called—which has been characterised "as the most effective of all checks on the mendacity or misrepresentations of witnesses," as not only may the interests, motives, memory, character, &c., of the witness be investigated, but an opportunity is also afforded of observing his demeanour when subjected to the ordeal of cross-examination. Cross-examination.

"Leading questions" may, as a general rule, be put, and great latitude has been allowed as to the matter on which the witness may be cross-examined. The general principle, as pointed out by Mr. Justice Stephen, being (subject to the restrictions which we shall presently point out) that the witness may be asked any questions which tend (1) to test his accuracy, veracity, or credibility; or (2) to shake his credit by injuring his character.

Thus, to take the illustration selected by Mr. Justice Stephen

<sup>(1)</sup> See Taylor on Evidence, 8th ed. <sup>(2)</sup> Best on Evidence, 7th ed. p. 469. p. 290.

Cross-examination.

from the celebrated Tichborne case. The question was, whether A. committed perjury in swearing that he was R. T. B. deposed that he made tattoo marks on the arm of R. T., which at the time of the trial were not, and never had been, on the arm of A. B. was asked, and was compelled to answer the question whether, many years after the alleged tattooing, and many years before the occasion on which he was examined, he committed adultery with the wife of one of his friends.

Judicature Rules as to cross-examination.

Now under the Judicature Rules, introduced in 1883, the judge has got a discretionary power, and may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter <sup>(1)</sup>.

It has been decided that counsel may cross-examine as to facts which appear to be irrelevant as relating to a third person on his undertaking to shew its relevancy by other evidence. In the case in which this point was drawn, the judge said that "the discernment of the jury must be trusted so far" in case it should turn out to be immaterial <sup>(2)</sup>.

Impeaching character of witness.

With regard to impeaching the character of a witness in cross-examination the following important provisions have been made by statute. A party *producing a witness* is not allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; "and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction of such offence, purporting to be signed by the clerk of the Court, shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature

<sup>(1)</sup> R. S. C., 1883, Order xxxvi., r. 38.

<sup>(2)</sup> *Haigh v. Belcher*, 7 C. & P. 389.

or official character of the person appearing to have signed the same <sup>(1)</sup>.

The same Act also makes the following important provisions with regard to previous statements made by a witness.

If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement (see as to previous *written* statements, *post*, p. 846).

Cross-examination.

It has recently been decided by the Court of Appeal that a plaintiff, calling the defendant as a witness, is not entitled as of right to cross-examine the defendant; the presiding judge has a discretion, in such case, as in every other case where a party desires to cross-examine a witness called by him, to allow, or to refuse to allow, such witness to be cross-examined <sup>(2)</sup>.

In connection with the subject of evidence on the trial of an action, attention must be directed to the following important provisions of the Judicature Rules with regard to granting new trials <sup>(3)</sup>.

New trials.

"A new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy or some or one only of the parties, the Court may give final judgment as to part thereof, or some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties." Where there has been a trial by jury

(1) C. L. P. Act, 1854, s. 25. By 28 & 29 Vict. c. 18 (Denman's Act) this enactment is extended to "all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive and examine evidence."

(2) *Price v. Manning*, 37 W. R. 785, overruling on this point *Clarke v. Saffery*, Ryan & Mac. 176, and approving of the decision in *Bastin*

*v. Carew*, on the next page, where the general principle was laid down by Lord Chief Justice Abbott: "In each particular case there must be some discretion in the presiding judge as to the mode in which examinations shall be conducted in order best to discover the purposes of justice."

(3) R. S. C. 1883, Order xxxix. r. 6.

the application is to be made to the Court of Appeal (*ante*, p. 797).

Perpetua-  
tion of  
testimony

Another peculiar form of action specially dealt with in the Judicature Rules must also here be noticed. The rules provide that any person who would under the circumstances alleged by him to exist become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim <sup>(1)</sup>.

It is also provided by the Judicature Rules that in all actions to perpetuate testimony touching any honour, title, dignity or office, or any other matter or thing in which the Crown may have any estate or interest, the Attorney-General may be made a defendant, and in all proceedings in which the depositions taken in any such action, in which the Attorney-General was so made a defendant, may be offered in evidence, such depositions shall be admissible, notwithstanding any objection to such depositions upon the ground that the Crown was not a party to the action in which such depositions were taken.

A brief allusion must also be made to the mode in which evidence is taken before examiners of the Court <sup>(2)</sup>.

Attention has already been directed incidentally to the provision of the Judicature Rules <sup>(3)</sup>, that the Court may provide for the examination of any witness whose attendance in Court ought for some sufficient cause to be dispensed with, by interrogatories or otherwise, before a commissioner or examiner. A further rule <sup>(4)</sup> provides that the Court or a judge may, in any cause or matter, where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or judge, or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such

<sup>(1)</sup> R. S. C. 1883, Order xxxvii. r. 36. This rule is taken from 5 & 6 Vict. cap. 69, now repealed, as to proceedings under which: see *Campbell v. Lord Dalhousie*, L. R. 1 Sc. & Div. 462; Daniel's Chancery Practice, 6th ed., 1512-1515; see also *Earl Spencer v. Peel*, L. R. 3 Eq. 415; *Moggridge v. Hall*, 13 Ch. D. 380; *Re Stoer*, 9 P. D. 120; *Marquis of*

*Bute v. James*, 33 Ch. D. 157.

<sup>(2)</sup> See as to the examiner, R. S. C. 1883, Order xxxvii. and xxxix., *et seq.* The examiner must be a barrister of not less than three years' standing.

<sup>(3)</sup> R. S. C. 1883, Order xxxvii. r. 1, *ante*, p. 868, *et seq.*

<sup>(4)</sup> R. S. C. 1883, Order xxxvii. r. 5.

deposition in evidence therein on such terms, if any, as the Court or a judge may direct.

A rule passed in December, 1888, provides that the examination of any witness or person under these rules shall in any cause or matter in *any* Division of the High Court be taken before one of the examiners of the Court <sup>(1)</sup>.

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<sup>(1)</sup> There is a proviso that nothing in the rule shall interfere with the practice as to examinations in Admiralty actions.

## CHAPTER V.

## PRIVILEGE.

Principle  
of the  
law.

The law excludes or dispenses with some kinds of evidence on grounds of public policy: on the ground that greater mischiefs would probably result from requiring or permitting their admission, than from wholly rejecting them <sup>(1)</sup>.

Five different kinds of evidence are protected from disclosure, or, as it is called, privileged on this account:—

Husband  
and wife.

1st. All communications between husband and wife. No husband is compellable to disclose any communication made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage. This privilege continues even after the dissolution of the marriage or the death of one of the parties <sup>(2)</sup>.

Barristers  
and solicitors.

2nd. When a barrister or solicitor is professionally employed by a client, all communications which pass between them in the course and for the purpose of that employment, are so far privileged, that the legal adviser, when called as a witness, cannot be permitted to disclose them, whether they be in the form of title deeds, wills, documents, or other papers delivered, or statements made to him, or of letters, entries or statements, written or made by him in that capacity.

“The foundation of this rule,” said Lord Brougham, in an oft-quoted passage <sup>(3)</sup>, “is not on account of any particular impor-

<sup>(1)</sup> Taylor on Evidence, 8th ed. p. 781.

<sup>(2)</sup> 16 & 17 Vict. c. 83, s. 3. The admissions of a wife, *e.g.*, as to receipt of money, are not evidence against the husband unless she be his agent: Roscoe's Evidence Nisi Prius, 15th ed. p. 68. The general rule is that, subject to two classes of exceptions, married people cannot give evidence against each other in any criminal cases, except treason. The exceptions are (1) where violence has been offered; and (2) statutory exceptions. The principal statutory exceptions are under:—The Conspiracy Act

(38 & 39 Vict. c. 86); the Army Act (44 & 45 Vict. c. 58); the Married Women's Property Acts (45 & 46 Vict. c. 75, and 47 & 48 Vict. c. 14, s. 1); the Criminal Law Amendment Act (48 & 49 Vict. c. 69, s. 20); the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 27); debtors and their wives may be examined on the application of the trustee; and see for other statutory exceptions, Stephen's Digest of the Law of Evidence, 5th ed. p. 123.

<sup>(3)</sup> *Bolton v. Corporation of Liverpool*, 1 Mylne & K. 94, 95; and *Greenhough v. Gaskell*, 1 Mylne & K. 103.



tance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If such communications were not protected, no man would dare to consult a professional adviser with a view to his defence or to the enforcement of his rights, and no man could safely come into a Court either to obtain redress or to defend himself."

Barristers  
and solicitors.

"Truth," said a judge, who was alike celebrated for the wisdom and soundness of his judgments and the wit and force of language with which he expressed them <sup>(1)</sup>, "like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."

The principle, as was pointed out in a leading case on the subject <sup>(2)</sup>, protecting confidential communications, is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when absolutely needed for the protection of his life or of his honour, or of his fortune. There are many communications which, though absolutely necessary, because without them the ordinary business of life cannot be carried on, still are not privileged.

Thus, communications made to a medical man, whose advice is sought by a patient with respect to the probable origin of a disease, even though they must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, are not protected. Communications made to a priest in the confessional, on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected. Communications made to a friend, with respect to matters of the most delicate nature on which advice is sought, with respect to a man's honour or reputation, are not protected.

<sup>(1)</sup> Lord Justice Knight-Bruce in *Pearse v. Pearse*, 1 De G. & Sm. 28, 29.

<sup>(2)</sup> *Wheeler v. Le Marchant*, 17 Ch. D. 681; and see *Lowden v. Blakey*, 23 Q. B. D. 332.

Barristers  
and solicitors.

On the contrary, the protection granted by the laws of this country to communications as privileged, is restricted to the obtaining of the assistance of lawyers as regards the conduct of litigation or the rights of property. It has never gone beyond obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers, which are protected from production or discovery, in order that that legal advice may be obtained safely and sufficiently.

"The actual communication," said Jessel, M.R. (in *Wheeler v. Le Marchant*), "to the solicitor by the client is protected, and it is equally protected whether it is made by the client in person or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction. Again, the evidence obtained by the solicitor, or by his direction or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened, with a view to the defence or prosecution of such litigation. So again, a communication with a solicitor for the purpose of obtaining legal advice is protected, though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose."

It is not now necessary, as it formerly was, for the purpose of obtaining protection, that the communications should be made either during or relating to an actual or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity <sup>(1)</sup>.

Communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure.

Indeed, if any such privilege should be contended for, or existed, it would work most grievous hardship on an attorney, who, after he had been consulted upon what subsequently appeared to be a manifest crime and fraud, would have his lips closed, and might place him in a very serious position of being

<sup>(1)</sup> *Minet v. Morgan*, 8 Ch. 361, *Gardner v. Irvin*, 4 Ex. D. 49; see also on the subject of privileged communications: *Lyell v. Kennedy*, 9 App. Cas. 81; Brett's Leading Cases in Equity, 285, *et seq.*, where the authorities are collected. It was decided in *Crawcour v. Salter*, 18

Ch. D. 30, that a solicitor employed to obtain the execution of a deed, and who is not one of the witnesses, is not privileged from giving evidence as to what passed at the time of the execution. And see *Corporation of Salford v. Lever*, 24 Q. B. D. 695.

suspected to be a party to the fraud, and without his having an opportunity of exculpating himself <sup>(1)</sup>.

In this case the law was stated to be that the Court must in such particular case determine upon the facts actually given in evidence, or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it.

3rd. The law as to privilege in respect of a third class of persons has been stated as follows in a standard work. "Judges, arbitrators, and counsel are, perhaps, not compellable at all, and certainly will not be compelled, unless under the most exceptional circumstances, to testify as to matters as to which they have been judicially or professionally engaged. They may, however, be called upon to speak to foreign and collateral matters which happened in their presence while the trial was pending, or after it was ended, and they may be examined by their own consent" <sup>(2)</sup>.

The rules of the Court as to the admissibility of the evidence of arbitrators was very carefully considered in a case which came before the House of Lords in 1872, in which the opinions of the judges were taken, and as the law with regard to arbitration has been brought into prominence by recent legislation (*ante*, p. 759), it will be desirable to state shortly the result of the decision.

(1) An arbitrator or umpire is a competent witness, like any other person, to prove matters material to the issues.

(2) Questions may properly be put to him for the purpose of proving the proceedings before him, so as to arrive at what was the subject-matter of adjudication when the proceedings closed, and he was about to make his award.

(3) As regards the effect of the award no question can properly be put to the umpire for the purpose of proving how it was arrived at, or what items it included, or what was the meaning which he intended at the time to be given to it.

As soon as the award is made it must speak for itself. It must be applied, as in other cases, by extrinsic evidence, to the subject-matter, but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it.

(1) Per Stephen, J., in *The Queen v. Cox and Railton*, 14 Q. B. D. (C. C. R.) 153.

(2) Taylor on Evidence, p. 808. 8th edition, citing Greenleaf on Evidence.

There appears to me (said the judge from whose opinion we are quoting) to be the strongest objections against allowing the umpire to be examined for the purpose of showing what he intended to be included in the award.

The law on the subject was also summed up by Lord Cairns as follows :—" Upon every point which may be considered to be a matter of fact with reference to the making of the award, the evidence of the arbitrator or umpire is properly admissible. He is properly asked what has been the course which the argument before him has taken—what claims are made, and what admitted ; so that we may be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased. The award is a document which must speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made) what is to be found upon the face of that written instrument " (1).

Secrets of  
State.

4th. Secrets of State, or matters the disclosure of which would be prejudicial to the public interest (2).

5th. Evidence which is indecent or offensive to public morals, except in cases of necessity for the purposes of civil or criminal justice.

(1) 5 English and Irish App. 432, *et seq.*

(2) See also on this subject, the Act passed in 1889 to prevent the disclosure of official documents and information, which is to be cited as

"The Official Secrets Act, 1889," 52 & 53 Vict. c. 52. And see as to action against agent of Colonial Government, *Wright v. Mills*, 62 L. T. 558.

## CHAPTER VI.

## HANDWRITING.

Suppose, in the course of an action or other proceeding, it becomes necessary to prove that documents were written or signed by a certain person. This may be done in several ways. The best evidence, of course, is to call as a witness either the writer himself or some person who actually saw the particular paper or signature in question written. As, however, it frequently happens that such evidence cannot be produced, the writing may be proved by the testimony of witnesses who are acquainted with the handwriting.

Various  
modes in  
which  
hand-  
writing  
may be  
proved.

This knowledge may have been obtained either from having seen the person actually write (*ex visu scriptiois*), or from the witness having seen in the ordinary course of business documents proved to have been written by the person in question (*ex scriptis olim visis*).

In the former case the evidence is admissible, even though the witness may have only once seen the writer write, and the evidence has even been admitted with regard to a party who only made his mark.

With regard to the evidence of a person who testifies from previously-acquired knowledge of the handwriting, the law has been judicially stated as follows:—

“The knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them, by written answers producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party, evidence of the identity of the party being, of course, added *aliundè*, if the witness be not

personally acquainted with him" (1). A clerk who has constantly read letters, or a servant who has habitually carried them, may be competent to give evidence from his knowledge of the handwriting so acquired.

Proof of  
hand-  
writing.

The handwriting may also be proved by a comparison of the document in dispute with any handwriting "proved to the satisfaction of the judge to be genuine" (*ex comparatione scriptorum*) (2).

A person with respect to whose handwriting a question has arisen may, if present in Court, be ordered by the judge there and then to write something which may be compared with the writing in dispute. All circumstances connected with the writing, *e.g.* the orthography, the style, &c., may then be considered by the experts, the jury, and the Court who have to determine the question of genuineness. An amusing illustration of this test is given by Mr. Taylor, which cannot be better told than in his own words. "A plaintiff, on one occasion, denied most positively that a receipt produced was in his handwriting. It was thus worded, "Received the Hole of the above." On being asked to write a sentence in which the word "whole" was introduced, he took evident pains to disguise his writing, but he adopted the above *phonetic* style of spelling, and also persisted in using the capital H. On being subsequently threatened with an indictment for perjury, he absconded" (3).

Can a witness be cross-examined as to previously-written statements without having the writing itself shown him? This question has been answered by the Legislature as follows:—

"A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection,

(1) *Doe v. Suckermore*, 5 A. & E. 730.

(2) This rule, originally introduced into English law by the Common Law Procedure Act, 1854, now extends to "all Courts of Judicature, as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive and examine evidence, whether

in England or in Ireland," 28 & 29 Vict. c. 18, and has been adopted by the Committee of Privileges in the House of Lords: Taylor on Evidence, 8th ed. p. 585.

(3) A striking illustration of the same test was also given by the peculiar mode in which a witness in the Parnell Commission spelt the word "hesitancy."

and he may thereupon make such use of it for the purposes of the trial as he shall think fit" <sup>(1)</sup>.

The effect of this section has been stated in a standard work as follows:—The witness, in the first instance, may be asked whether he has made such and such a statement in writing without its being shown to him <sup>(2)</sup>. If he denies that he has made it, the opposite party cannot put in the statement without first calling his attention to it (showing it, or at least reading it to him), and to any parts of it relied upon as a contradiction. If the witness instead of denying that he has made the statement, admits it, although the object of the cross-examining counsel has been attained, it may be very important for the party calling the witness to have the whole statement, which may not be in his possession, before the Court and jury <sup>(3)</sup>.

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<sup>(1)</sup> 17 & 18 Vict. c. 125 (C. L. P. Act, 1854), s. 24, reversing the rule laid down by the judges in *Queen Caroline's Case*, 2 B. & B. 286.

<sup>(2)</sup> *Sladden v. Serjeant*, 1 F. & F. 322.

<sup>(3)</sup> Day's Common Law Procedure Act, 1854.

## CHAPTER VII.

## HEARSAY.

Principle  
of the law  
as to  
hearsay.

The law proceeds in general upon the principle that it is indispensable to the proper administration of justice that every witness should give his testimony under the sanction of an oath, or its equivalent, a solemn affirmation ; and secondly, that evidence should be subject to the ordeal of cross-examination by the party against whom he is called, so as to test the perception, the attentiveness, the memory, and the credibility of the witness.

Evidence which is derived from the relation of third persons obviously cannot be subjected to these tests, for, as a learned judge said, "if the first speech were without oath, another oath that there was such speech makes it no more than a mere speaking, and so of no value in a Court of Justice."

Hearsay evidence has been defined or described as that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. In its legal sense it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person.

The objections to hearsay evidence are, that it is not given upon oath, that it cannot be tested by cross-examination ; that it implies some better testimony which might have been adduced, and that its admission would have a tendency to protract and embarrass legal investigations, and would promote fraud.

Definition  
of "hear-  
say."

The term "hearsay" is used with reference to what is done or written, as well as to what is spoken, *e.g.* the conduct of his family or relation towards a person in treating him as if he were a lunatic on the one hand, or appointing him to some responsible business on the other, or the conduct of the captain of a vessel in examining it carefully and then embarking with his family on a voyage, is treated as hearsay evidence.

The cases in which the rule rejecting hearsay evidence has been relaxed are :—



Hearsay  
evidence  
where  
admissible.

1. Those relating to matters of public and general interest.
2. Those relating to pedigree.
3. Those relating to ancient possession.
4. Declarations in the course of office or business.
5. Declarations against interest.
6. Dying declarations.

1 and 2. "It has been established for a long while," said Lord Blackburn in a celebrated judgment, "that in questions of pedigree—supposed, upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice—but, for whatever reason, the statements of deceased members of the family, made *ante litem motam* before there was anything to throw doubt upon them, are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them or assented to them, or did anything that amounted to showing that they recognised them" (1).

"There is also," said the same authority, "another large class of cases where, from the nature of the thing, evidence of reputation from deceased persons is admissible—where it is a public right, or a quasi public right, evidence of reputation is admissible if you prove that the deceased person was of the class who would know it and had stated it."

The declaration must be by persons having such a connection by blood or marriage with the party to whom it relates, that it is natural and likely from their domestic habits and connections that they are speaking the truth and are not mistaken, and before the declaration can be admitted this relationship must be independently proved. The sufficiency of the evidence on this point is a question for the judge (2).

In order that a declaration should be admissible in evidence, either in matters of public and general interest or in matters of pedigree which fall under the next head, the law requires that they should be made *ante litem motam*, and it is now established by the authorities, after some confusion, that there must be not merely facts which may lead to a dispute, but a *lis mota*, or suit, or controversy, preparatory to a suit actually commenced, or dispute arisen, and that upon the very same pedigree or subject-matter which constitutes the question in litigation.

(1) *Sturla v. Freccia*, 5 App. Cas., at pp. 640, 641.

(2) Roscoe on Evidence, 15th ed. p. 45.

Public and  
general  
interest.

A distinction must here be drawn between public interest and general interest.

Matters of public interest being those which concern every member of the State, and matters of general interest being those which concern a lesser, though still a considerable portion of the community.

The rule on this subject has been laid down by a high authority, as follows: "In cases of rights or customs which are not, strictly speaking, public, but are of a general nature and concern a multitude of persons (as in questions with respect to boundaries and customs of particular districts), it seems that hearsay evidence is not admissible, unless it be derived from persons conversant with the neighbourhood. On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary. But where the right is strictly private (a claim of highway, for instance), in which all the King's subjects are interested, it is difficult to say that there ought to be any such limitation. In a matter in which all are concerned, refutation from any one appears to be receivable, but almost worthless unless it came from persons who are shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute" <sup>(1)</sup>.

The rule which admits hearsay evidence in pedigree cases is confined to the proof of pedigree, and does not apply to proof of the facts which constitute a pedigree, such as birth, death, and marriage, when they have to be proved for other purposes. Accordingly, in an action for goods sold, to which the defence was infancy, an affidavit stating the date of the defendant's birth, which had been made by his deceased father, and in an action to which the plaintiff was not a party, was held inadmissible as evidence of the age of the defendant in support of his defence <sup>(2)</sup>.

3. The third exception is that ancient documents are admissible on behalf of persons claiming under them and against persons in no way privy to them, but, in order that they should be so admissible, they must be not mere narratives of past events, but must purport to have formed a part of the act of ownership, exercise of right, or other transaction to which they relate <sup>(3)</sup>. It is not necessary, in the language of Chief Justice

<sup>(1)</sup> Per Parke, J. B., in *Crease v. Barrett*, 1 C. M. & R. 919; *Doe d. Molesworth v. Sleeman*, 9 Q. B. 301.

<sup>(2)</sup> *Haines v. Guthrie*, 13 Q. B. D.

818.

<sup>(3)</sup> Taylor on Evidence, 8th ed. p. 580, *et seq.*

Tindal (1), "that the document should be found in the best and most proper place of deposit." It is sufficient if they are found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found. In those cases the proposition to be determined is whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine.

Ancient documents.

4. Where a deceased person in the course of his duty makes a contemporaneous entry of an act which he has done, and returns that in the course of his business, then, after his death, it is received as evidence.

Entries by a person in the discharge of his official duty are only evidence of the facts therein stated, where the facts are parts of a transaction effected by such person himself, which it is his duty to record (2).

Entries in course of business.

This proposition may be illustrated by the leading case of *Price v. Earl of Torrington*. In that case the plaintiff, who was a brewer, brought an action against Lord Torrington for beer sold and delivered, and, in order to prove the delivery of the beer, a book was put in containing an account of the beer delivered by the plaintiff's drayman, which it was the duty of the drayman, in the usual course of his business, to sign daily. The drayman who had signed the account of beer delivered to the defendant was dead, and the book was admitted in evidence on proof of his handwriting (3).

Entries made in the course of business are, however, not admissible unless the following four conditions are satisfied:

(1) That it is an entry of a transaction effected or done by the person who makes the entry; (2) that it is an entry made at the time of such transaction, or near to it; (3) that it is made in the usual course and routine of business by that person, and (4), that he was at that time a person who had no interest to misstate what had occurred (4).

5. "Documents on the face of them appearing to be against

(1) 3 Bing. N. C. 200-202; 10 Bligh. 462-464.

(2) *Polini v. Gray*. *Sturla v. Freccia*, 12 Ch. D. 411. In order, however, that the evidence should be admissible, the entry must have been made in the course of business in the performance of a duty: per Hall, V.C., *Massey v. Allen*, 13 Ch. D. 563.

(3) *Price v. Torrington*, Salkeld, 285; Smith's Leading Cases, vol. i.

The rule to be collected from all the cases is, that it is an essential fact to render such an entry admissible, that not only it should be made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates, and then to make a record of it: Smith's Leading Cases, vol. i. p. 357, 9th ed.

(4) *Polini v. Gray*, 49 L. J. Ch. 7.

Entries  
against  
interest.

the interest of a deceased person who stated the matter, are evidence." It has been decided that the word "interest" in this rule, admitting hearsay evidence, means "pecuniary," or "proprietary" interest <sup>(1)</sup>.

In order that an admission made by a dead man may be admissible in evidence on the ground that it was against his interest, it must have been actually against his interest at the time when it was made; it is not sufficient that it might possibly turn out afterwards to have been against his interest <sup>(2)</sup>.

The rule is that an admission which is against the interest of the person who makes it, at the time when he makes it, is admissible; not that an admission which may or may not turn out at some subsequent time to have been against his interest, is admissible.

The well-known illustration of this proposition is the leading case of *Higham v. Ridgway*.

The facts in that case were as follows:—An entry had been made by a man-midwife who had delivered a woman of a child, of his having done so on a certain day, referring to his ledger, in which he had made a charge for his attendance, which was marked as *paid*. The entry was admitted as evidence <sup>(3)</sup>.

A distinction has been drawn by the Court between declarations made against interest and declarations only made in the course of business. The former class of declarations are evidence of *all* the facts stated whensoever made. The latter are evidence only of the facts which it was strictly the business of the writer to record, and they must generally speaking be made contemporaneously with the act done.

It was decided in a recent case, that although an entry in a baptismal register by the officiating clergyman of the day when the baptized child was born, furnishes no proof *per se*, that the child was born on the day stated, the entry will not be rejected altogether as an item of evidence upon an inquiry as to the legitimacy, from its birth before or after the marriage of its reputed parents, of the child in question. In this case, declarations by a reputed father contained in business letters, written

<sup>(1)</sup> Per Lord Blackburn, *Sturla v. Freccia*, 5 App. Cas. 640. In *Sugden v. Lord St. Leonards*, 1 P. D. 154, 250, the late Lord Justice Mellish expressed a very strong opinion that it would be a highly desirable improvement in the law if the rule was that all statements made by persons who are dead re-

specting matters of which they had a personal knowledge, and made *ante litem motam*, should be admissible as evidence.

<sup>(2)</sup> *Ex parte Edwards, In re Tollemache*, 14 Q. B. D. 415.

<sup>(3)</sup> 1 East, 109; Smith's Leading Cases, vol. ii.

by one of his daughters in his name and under his dictation, were admitted as evidence after his death, of the date of their birth, upon the question of their legitimacy <sup>(1)</sup>. Entries  
against  
interest

The general principle upon which the law proceeds in admitting not only evidence of this description, but even verbal declarations of deceased persons, has been well stated as follows :

“The law proceeds upon the principle upon which written entries of a deceased person are admissible in evidence, that, in the interests of justice, where a person who might have proved important material facts in an action is dead, his statements before death—I pass over for the moment whether in writing or verbal—relating to that fact are admissible, provided there is a sufficient guarantee that the statements made by him were true. It is considered, and properly considered, that where the statements made by a person were statements against his interests, those statements, at all events in the general run of cases, would probably be true.

“Now, is there any reason in principle why there should be a distinction made between the written entries of such a deceased person under such circumstances and his verbal declarations? I can see no reason. When the statements are merely verbal, there is every reason for watching more carefully the evidence by which those declarations are proved ; but, provided you are satisfied the declarations were in fact made, there is no reason whatever why there should be any distinction between the admissibility of the verbal declarations and the admissibility of the written entries ” <sup>(2)</sup>.

6. The sixth exception is that hearsay evidence is admitted in the case of dying declarations, but only in trials for the murder or manslaughter of the person making the declaration. The death of the deceased must be the subject of the charge, and the circumstances of the death must be the subject of the dying declaration. Three circumstances must concur to render such declaration admissible as evidence : (1) Actual danger of death ; (2) Full apprehension at the time of such danger ; (3) Death must follow. All objections that might have been made by the evidence on the ground of imbecility or tender age, had the declarant been alive, apply to his dying declaration, and the Court receives such evidence with great caution as it cannot be tested by cross-examination. Dying de-  
clarations.

The principle on which this evidence is admissible, is that

<sup>(1)</sup> *In re Turner, Glenister v. Harding*, 29 Ch. D. 985.

<sup>(2)</sup> *Per Thesiger, L.J., Bewley v. Atkinson*, 49 L. J. Ch. 160.

when death is instant, every motive to falsehood is silenced, and the mind is induced by the most powerful motive to speak the truth <sup>(1)</sup>.

An apparent exception from the general rule of the law excluding hearsay evidence, must here be noticed. Words and declarations are, in certain cases, admissible as original evidence on the principle that they form part of the *res gestæ* <sup>(2)</sup>.

Thus, in Lord George Gordon's case, when it was proved that the person had marched at the head of the mob, the cries of the mob though made when he was not present were held to be admissible as evidence against him, as explaining the nature of the common object of himself and the mob. And to refer to another State trial, in O'Connell's Case, where the charge was of summoning illegal monster meetings for illegal purposes, evidence was admitted that papers advocating the views of the defendants or traversers, as they were technically called, in that case, were admitted. Again, where the question arose in a policy of insurance whether a person had an insurable interest therein (see *ante*, p. 270), evidence that he had consulted another person as to insuring his life was admitted.

Admissions and confessions are generally treated as exceptions from the rule excluding hearsay evidence, but this would seem to be more correctly regarded as substitutes allowed by the law for the ordinary mode of proof, either on the ground that the party himself has consented to this course, or on the grounds of public policy <sup>(3)</sup>.

The term admission is usually applied to civil transactions, and to those matters of fact, in criminal cases, which do not involve criminal intent, the term confession being generally restricted to acknowledgments of guilt.

The distinction between admissions and confessions is very well illustrated by the case cited by Mr. Taylor <sup>(4)</sup>. When

<sup>(1)</sup> Per Eyre, C.B., *R. v. Woodcock*, 1 Lea. 502. The same idea is beautifully expressed by Shakespeare in 'King John':—

"Have I not hideous death within my view,  
Retaining but a quantity of life,  
Which bleeds away, even as a  
form of wax  
Resolveth from his figure 'gainst  
the fire?"

What in the world should make  
me now deceive,  
Since I must lose the use of all  
deceit?

Why should I then be false, since  
it is true

That I must die here, and live  
hence by truth?"—Act v. Sc. 4.

<sup>(2)</sup> Roscoe on Evidence, 15th ed. p. 49; Taylor on Evidence, 8th ed. p. 519.

<sup>(3)</sup> Taylor on Evidence, 8th ed. p. 632, where the Roman law is cited to the effect that confession was rather *ab onere probandi relevationem quam proprie probationem*.

<sup>(4)</sup> Taylor on Evidence, 8th ed. vol. i. p. 634, citing Lord Melville's trial, 29 How St. Tr. 746-764.

Lord Melville was charged with criminal misapplication of public money, the admission of his agent was held sufficient proof of the fact that the agent had received the money, while such evidence would have been wholly inadmissible on the charge of misapplication of the money. "The receipt by the paymaster," said Lord Erskine, "would of itself involve him civilly, but could by no possibility convict him of a crime."

## BOOK VIII.

### BANKRUPTCY.

#### CHAPTER I.

##### COMMENCEMENT OF BANKRUPTCY.

General principle on which the bankruptcy law is founded.

The general principle on which the law of bankruptcy is founded, as well expressed by Mr. Robson <sup>(1)</sup>, is that when a man becomes insolvent the property then remaining to him rightfully belongs to his creditors and ought to be distributed rateably among them towards satisfaction of their claims, the debtor himself being released from future liability in respect of his debts upon giving all the aid in his power towards the realisation and distribution of his estate for the benefit of his creditors, and fulfilling the other conditions prescribed by the law for his discharge. "The broad purview of the Act is that the bankrupt is to be a freed man—freed not only from debts, but from contracts, liabilities, engagements, and contingencies of every kind. On the other hand, all the persons from whose claims, and from liability to whom he is so freed, are to come in with the other creditors and share in the distribution of the assets" <sup>(2)</sup>.

This twofold object it has been the aim of previous Acts of Parliament to attain, but it must be confessed that the efforts of the Legislature in respect to the administration of the estates of insolvents under the bankruptcy law have, generally speaking, been rewarded with but scant success. The law of bankruptcy originating in failure, has been to a great extent a failure itself. A new point of departure was, however, taken by the Bankruptcy Act of 1883 (which as amended by the Bankruptcy Act, 1890 <sup>(3)</sup>), together with the rules and orders under both Acts now regulate the law of bankruptcy <sup>(4)</sup>). This

<sup>(1)</sup> Robson on Bankruptcy, p. 1.

<sup>(2)</sup> Per James, L.J., *Ex parte Llynvi Coal and Iron Company, Re Hyde*, L. R. 7 Ch. 28, 32, speaking with regard to the provisions of the Act of 1869, which are on this point similar to those of the present Act of 1883 (46 & 47 Vict. c. 52). See also as to

the scope of the present bankruptcy law, *post*, p. 934.

<sup>(3)</sup> 53 & 54 Vict. c. 71. The two Acts may be cited collectively as the Bankruptcy Act, 1883 and 1890 (53 & 54 Vict. c. 71, sect. 31).

<sup>(4)</sup> 46 & 47 Vict. c. 52.



important statute recognises the fact that the state as such is concerned with the insolvency of its members, and consequently has provided that increased publicity and scrutiny shall be bestowed on the dealings of any one who may become subject to the bankruptcy law, and that a debtor shall not be able easily and quietly to shuffle off the coil of his liabilities through the complacency of irresponsible officials, or the carelessness or good-nature of creditors. The Act of 1869 left matters very largely in the hands of creditors. The Bankruptcy Act, 1883, deprived the creditors of many of their former powers, and provided for their exercise by means of the judicial powers and duties of the Court and of the administrative, and in some matters *quasi*-judicial, functions of the Board of Trade. The provisions of the Bankruptcy Act, 1883, have been rendered still more stringent by the Bankruptcy Act, 1890, which came into operation on the 1st of January, 1891. The Bankruptcy Acts of 1883 and 1890 are to be construed as one Act, and are to be cited collectively as the Bankruptcy Acts 1883 and 1890 <sup>(1)</sup>.

All proceedings in bankruptcy are commenced by a petition <sup>(2)</sup>, which may be presented either by a creditor or creditors or by the debtor himself.

Commence-  
ment of  
proceed-  
ings.

It has been decided that a receiver appointed in an action in the Chancery Division is not in a position to present a petition against the debtor in respect of a sum of money the debtor has omitted to pay him in accordance with an order of the Court, the reason being that there is no debt due to the receiver <sup>(3)</sup>.

More than 300 years ago certain acts of bankruptcy, or *indicia* of insolvency as they are sometimes called, were prescribed by the legislature. Now, in the case of a debtor's petition, the petition must state that the debtor is unable to pay his debts, and the presentation of the petition without the previous filing by the debtor of any declaration of inability to pay his debts, is in itself an act of bankruptcy by sect. 4, sub-sect. (f), and is also deemed to be an act of bankruptcy by the provisions of sect. 8, but a creditor's petition must now, as formerly, allege an act of bankruptcy—"the 'capital offence' of which a man must have been previously guilty before he can be 'duly' adjudged a bankrupt" <sup>(4)</sup>.

The debtor must be told what the act of bankruptcy is which

<sup>(1)</sup> 53 & 54 Vict. c. 71, ss. 30 & 31.

<sup>(2)</sup> See as to petition in wrong court: *Re French*, 24 Q. B. D. 63.

<sup>(3)</sup> *In re Sacker. Ex parte Sacker*, 22 Q. B. D. (C. A.) 179, explaining

and distinguishing *Ex parte Harris*, 2 Ch. D. 423; and see as to costs of petition: *Re Smith*, 37 W. R. 558.

<sup>(4)</sup> *Ex parte Learoyd. Re Foulds*, 10 Ch. Div. 3, 8.

is alleged against him, so that he may have an opportunity of contesting it in the first instance; and he who alleges that another person has committed an act of bankruptcy is bound to prove his case affirmatively and with great strictness <sup>(1)</sup>.

It is, said the late Vice-Chancellor Bacon in an oft-quoted judgment <sup>(2)</sup>, the very gist and essence of the Bankruptcy Act, that creditors who claim the benefit of these severe and almost criminal provisions of the law cannot have that benefit unless they strictly comply with the terms of the Act. There is in the bankrupt law a certain savouring of criminality, and as in criminal proceedings no evidence of general moral delinquency on the part of the person charged can be admitted against him, so the Court, though the bankrupt may be largely indebted, cannot go into the general merits of the case, but must confine itself strictly to what is strictly alleged and clearly proved in the evidence before it.

The acts of bankruptcy or statutory *indicia* of insolvency may be considered under four heads:—

Debtor's  
dealings  
with his  
property.

- (A.) The debtor's dealings with his property.
- (B.) The debtor's acts independent of property.
- (C.) The action of creditors.
- (D.) The order of Court <sup>(3)</sup>.

(A.) The acts of bankruptcy prescribed by the Bankruptcy Act which are founded upon the debtor's dealings with his property, are as follows:—

(1.) A conveyance or assignment *in England or elsewhere* of his property to a trustee or trustees for the benefit of his creditors *generally*.

(2.) A fraudulent conveyance, gift, delivery or transfer, *in England or elsewhere* of his property, or of any part thereof.

(3.) Any conveyance or transfer of, or charge on his property, or any part thereof, made *in England or elsewhere*, which would be void as a fraudulent preference if the debtor were adjudged bankrupt <sup>(4)</sup>. (See as to fraudulent preference, *post*, p. 921).

It was decided by the Court of Appeal, in 1890 <sup>(5)</sup>, that under the first of these heads there must be a conveyance or assignment

<sup>(1)</sup> *Re Stanger*, 22 Ch. D. 436.

<sup>(2)</sup> *Ex parte Coates. Re Skelton*, 5 Ch. D. 979, 982.

<sup>(3)</sup> Bankruptcy Act, 1883, s. 4, Brett's Bankruptcy, LIII.; and see Robson's Bankruptcy, p. 56, for another division.

<sup>(4)</sup> It is a long-established principle that all acts of bankruptcy must

be committed in England or Wales, unless the statute expressly provides otherwise (*Inglis v. Grant*, 5 T. R. 530), but note that the above-mentioned acts of bankruptcy may be committed anywhere.

<sup>(5)</sup> *In re Spackman. Ex parte Foley*, 24 Q. B. D. 728.

in the proper sense of the term, by which the whole or substantially the whole of the debtor's property is vested in a trustee or trustees for the benefit of the creditors generally. Other modes of disposition of the debtor's property not properly conveyances or assignments, *e.g.*, a declaration of trust by the debtor or a mere agreement by him that his property shall be dealt with for the benefit of creditors is not sufficient to constitute an act of bankruptcy within the meaning of this sub-section of the Act.

A debtor may deal with his property in such a way that the Court considers itself bound to infer that his intention is to withdraw from the creditors those funds on which they are justly entitled to rely for payment of their claims. An assignment for the benefit of creditors generally has always been regarded as such an act of bankruptcy, although no creditor who comes in under the deed is allowed to rely on it as an act of bankruptcy for the purpose of a petition <sup>(1)</sup>. Where a man assigns the whole of his property as a security for a *past* debt only, it is an act of bankruptcy, whatever the motives of the parties may have been <sup>(2)</sup>. Where, however, an assignment is made and there is a substantial exception, or where the assignment is made in consideration partly of a past debt and partly of a substantial further advance, the transaction may be upheld <sup>(3)</sup>. It is sufficient if there be a *bonâ fide* agreement, not necessarily binding at law or in equity, to make further advances. Where there is a present advance neither its amount nor its intended application is material <sup>(4)</sup>. The real question in all such cases is, whether the arrangement was made *bonâ fide* with the view of enabling the debtor to continue his business, or whether it was a mere scheme to obtain payment of the existing debt <sup>(5)</sup>.

To constitute an act of bankruptcy under the second head there must be a conveyance, gift, delivery or transfer of the debtor's property or part thereof with a fraudulent intention <sup>(6)</sup>.

Fraudulent preferences <sup>(7)</sup> are by the Bankruptcy Act, 1883, for the first time declared to be acts of bankruptcy.

(B.) The debtor's acts, independent of property, which amount to acts of bankruptcy, are—

<sup>(1)</sup> *Ex parte Stray*, L. R. 2 Ch. 374. See *Re Tanenberg*, 60 L. T. 270; *Re Hollinshead*, 60 L. T. 273; *Re Stephenson*, 20 Q. B. D. 540.

<sup>(2)</sup> *Ex parte Ellis*, 2 Ch. D. 797; *Ex parte Chaplin*, 26 Ch. D. 319.

<sup>(3)</sup> *Lomax v. Buxton*, L. R. 6 C. P. 107; *Ex parte Johnson*, 26 Ch. D. 338.

<sup>(4)</sup> *Ex parte Ellis*, 2 Ch. D. 797.

<sup>(5)</sup> *Ex parte Wilkinson*. *Re Berry*, 22 Ch. Div. 788.

<sup>(6)</sup> *Re Spackman*. *Ex parte Foley*, 24 Q. B. D. 728.

<sup>(7)</sup> Defined by the 48th section of the Bankruptcy Act, 1883; considered, *post*, p. 921. See *Re Fleming*, 60 L. T. 154.

Debtor's  
acts inde-  
pendent of  
property.

- (1.) If with intent to defeat or delay creditors he departs out of England, or being out of England remains out of England; or departs from his dwelling-house; or otherwise absents himself; or begins to keep house.

The acts of bankruptcy enumerated in this sub-section were the subject of many decisions under the former law. "Departing out of England" is of itself a complete act of bankruptcy the very moment the debtor goes away with the intent to defeat or delay creditors, but the presumption of the intent to defeat or delay creditors will not be made in case of a foreigner who is in England for merely a temporary purpose <sup>(1)</sup>.

When a man "remains out of England," he is regarded by the law as committing an act of bankruptcy every day, his so remaining is treated as a continuing act. The usual evidence of "beginning to keep house" is that the debtor denies himself to a creditor who has called for his debt. Such denial, however, may be explained away.

The intent to defeat and delay creditors which, though not expressed, is a necessary element in acts of bankruptcy under the first division, viz. that comprising the debtor's dealings with his property, is here expressly mentioned. As was pithily observed by Bacon, C.J.:—

"The fact of the debtor having departed from his dwelling-house in itself announces nothing. He may have gone to bury his wife, or his mother, or to a meet of foxhounds. But that which the law holds, and rightly holds, to be the important fact is, that he has departed 'with intent to defeat or delay his creditors'" <sup>(2)</sup>.

- (2.) Filing in the Court a declaration of his inability to pay his debts or presenting a bankruptcy petition against himself;
- (3.) Giving notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts <sup>(3)</sup>.

In order that such a notice should constitute an act of bankruptcy it must be an unqualified unconditional notice from

<sup>(1)</sup> *Ex parte Gutierrez*, 11 Ch. Div. 298. See among other decisions: *Ex parte Gardner*, 1 V. & B. 45; *Ex parte Osborne*, 2 V. & B. 178; *Ex parte Bunny*, 1 De G. & J. 309; *Hammond v. Hinks*, 5 Esp. 139. For a very full enumeration of cases on this subject, the reader is referred to Deacon on Bankruptcy, p. 43, 2nd ed.

<sup>(2)</sup> *Ex parte Coates. Re Skelton*, 5

Ch. D. 979.

<sup>(3)</sup> Bankruptcy Act, 1883, s. 4, sub-s. (h). The notice need not be in writing, but must be given formally and deliberately: *Ex parte Nickoll. Re Walker*, 13 Q. B. D. 469; *Ex parte Oastler. Re Friedlander*, 13 Q. B. D. 471; or must necessarily import a contemplated suspension: *Re Lamb. Ex parte Gibson*, 4 Mor. 25.

which an ordinary man of business would understand that, if the creditors would not accept less than the amount due to them, the debtor had no alternative but to suspend payment. A notice couched in the form: "Being unable to meet my engagements as they fall due, I invite your attendance at the Guildhall Tavern, Gresham Street, on Wednesday next, at 3 p.m., when I will submit a statement of my position for your consideration and decision," was held by a majority of the Court of Appeal to be a notice that the debtor was "about to suspend payment of his debts," and that the giving of it accordingly constituted an act of bankruptcy <sup>(1)</sup>.

(C.) By action of the creditors an act of bankruptcy may arise in either of two ways:—

Actions of  
creditors.

(1) The Bankruptcy Act, 1890 <sup>(2)</sup>, declares that a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days. This is followed by a provision that, where an interpleader summons (*ante*, p. 764) has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall *not* be taken into account in calculating such period of twenty-one days.

(2) An act of bankruptcy also arises by service on the debtor of a bankruptcy notice by a creditor who has obtained a final judgment against the debtor for any amount and on which execution has not been stayed, requiring the debtor to pay the debt, or to secure or compound for it to the satisfaction of the creditor or the Court. If the debtor fails within seven days to comply with the notice, or to satisfy the Court that he has an equal or greater counter-claim, set-off, or cross demand which he could not have set up in the action, the act of bankruptcy is complete <sup>(3)</sup>.

The sub-section creating the last-mentioned act of bankruptcy has been construed with great strictness on the principle laid down by the Court of Appeal, that when the Legislature enacts that a particular act or default shall be an act of bankruptcy, the Court ought not to give to their words any but their strict and proper meaning, unless it be clearly satisfied

<sup>(1)</sup> *In re Crook*, 24 Q. B. D. 320. sect. 4, sub-sect. (e).

<sup>(2)</sup> 53 & 54 Vict. c. 71. sect. 1. <sup>(3)</sup> Bankruptcy Act, 1883, sect. 4, repealing Bankruptcy Act, 1883, sub-sect. (g).

that it was the intention of the legislature to use the words in a larger sense. The Court of Appeal accordingly held that, as the words "final judgment" had a proper technical meaning, they ought, when they were found in a section of an Act of Parliament which was defining acts of bankruptcy, to be construed as strictly as if they occurred in a section which was defining a misdemeanour, "because the commission of an act of bankruptcy entails disabilities on the person who commits it" <sup>(1)</sup>.

This rule has been very strictly followed in spite of numerous attempts to found bankruptcy notices on orders or judgments not properly "final judgments" <sup>(2)</sup>. Any person however who is for the time being entitled to enforce a final judgment is to be deemed a creditor who has obtained a final judgment <sup>(3)</sup>. When once the act of bankruptcy is complete, any creditor may found a petition upon it <sup>(4)</sup>.

It has been decided, however, that when in a bankruptcy petition the act of bankruptcy relied on is the failure to comply with a bankruptcy notice to pay a judgment debt, the mere fact that an appeal is pending from the judgment is not a sufficient ground for staying the proceedings upon the petition. The Court has power to, but will not, as a matter of course, inquire into the validity of a judgment debt, but only when there is evidence that the judgment has been obtained by fraud or collusion, or that there has been some miscarriage of justice <sup>(5)</sup>.

(D.) By order of the Court.

Order of  
the Court.

The Court has power (sect. 103), where an application is

<sup>(1)</sup> *Ex parte Chinery. Re Chinery*, 12 Q. B. D. 342.

<sup>(2)</sup> i.e., not amounting to a "proper *litis contestatio*, and a final adjudication between the parties on the merits": *Ex parte Moore. Re Faithfull*, 14 Q. B. D. 627. Thus a bankruptcy notice cannot be founded upon a garnishee order: *Ex parte Chinery*, 12 Q. B. D. 342; or on an order for costs: *Ex parte Schmitz. Re Cohen*, 12 Q. B. D. 509; or a "balance order" for calls; *Ex parte Whinney. Re Sanders*, 13 Q. B. D. 476; or on an order dismissing an action for want of prosecution, and directing the plaintiff to pay costs, or for alimony *pendente lite*; *Ex parte Grimwade. Re Tennent*, 17 Q. B. D. 357; *Re Riddell. Ex parte Earl of Strathmore*, 20 Q. B. D. 512; *Re Henderson*, 5 Mor. 52; 20 Q. B. D. 509.

<sup>(3)</sup> 53 & 54 Vict. c. 71, sect. 1. See, as to obtaining leave to issue

execution, *Ex parte Woodall*, 13 Q. B. D. 479; *Re Ide*, 17 Q. B. D. 755. It was held under the Bankruptcy Act of 1883, that an assignee of a judgment debt could not issue a bankruptcy notice: *Ex parte Blunckett. Re Keeling*, 17 Q. B. D. 303; and see *Re Goldring*, 22 Q. B. D. 87. As to when execution is stayed, see *Ex parte Ford*, 18 Q. B. D. 369; *Re Bates. Ex parte Lindsey*, 4 Mor. 192; *Re Phillips*, 5 Mor. 40; *Re Connan. Ex parte Hyde*, 20 Q. B. D. 690; distinguished, *Re Dennis*, 60 L. T. 348.

<sup>(4)</sup> *Ex parte Dearle. Re Hastings*, 14 Q. B. D. 184. The procedure with regard to bankruptcy notices is governed by Bankruptcy Rules 136-142; and see *Re Sedgwick*, 37 W. R. 72; *Re Russell*, 37 W. R. 21.

<sup>(5)</sup> *In re Flatiron. Ex parte Scotch Whisky Distillers, Limited*, 22 Q. B. D. (C. A.) 83.

made under sect. 5 of the Debtors Act, 1869, for the committal of a judgment debtor, to make, with the consent of the judgment creditor, in lieu of the order, a receiving order against the debtor. In such case the judgment debtor is deemed to have committed an act of bankruptcy at the time the order is made. And it is declared by the Bankruptcy Act, 1890 (sect. 20), that where a receiving order is thus made against a judgment debtor the bankruptcy of the debtor shall be deemed to have relation back (*post*, p. 924) to and to commence at the time of the order, or, if the bankrupt is proved to have committed any previous act of bankruptcy, then to have relation back to and to commence at the time of the first of the acts of bankruptcy proved to have been committed by the debtor within three months next preceding the date of the order. It is also provided that the law with regard to the avoidance of preferences in favour of creditors (*post*, p. 921) is to apply as if the debtor had been adjudged bankrupt on a bankruptcy petition presented at the date of the receiving order.

Relation  
back in  
case of  
receiving  
order  
against  
judgment  
debtor.

The distinction between traders and non-traders in respect of the law of bankruptcy has had a curious and a chequered history.

Traders  
and non-  
traders.

From the reign of Queen Elizabeth down to the coming into operation of the Act of 1861, the Bankruptcy laws were directed solely against traders, and even down to the coming into operation of the Bankruptcy Act of 1883, some of the acts of bankruptcy, and some also of the consequences of bankruptcy, only affected traders. But now all citizens alike, whether traders or not, are subject to the bankruptcy laws although infants, it would seem, cannot be made bankrupt <sup>(1)</sup>, and a married woman only if she carries on trade separately from her husband, and in respect of her separate property <sup>(2)</sup>. In the case of a lunatic so found leave was given in two cases before the Bankruptcy Act, 1883, to the committee to file a petition and to consent to an adjudication <sup>(3)</sup>, and by sect. 148 of the Bankruptcy Act, 1883, a lunatic may act by his committee or *curator bonis* <sup>(4)</sup>.

The distinction between traders and non-traders has been

<sup>(1)</sup> *Ex parte Jones*, 18 Ch. D. 109. Perhaps an infant might be made a bankrupt in respect of necessities, and see *The Queen v. Wilson*, 5 Q. B. D. 28.

<sup>(2)</sup> Married Women's Property Act, 1882, sect. 1, sub-sect. 5; Bankruptcy

Act, sect. 152; *Re Gardiner. Ex parte Coulson*, 20 Q. B. D. 249.

<sup>(3)</sup> *Ex parte Cahen*, 10 Ch. D. 183; *Re Lee*, 23 Ch. D. 216.

<sup>(4)</sup> For an instance, see *Re James*, 12 Q. B. D. 332.

tacitly abolished by the present Act, but it still exists for the following purposes:—

(1) Where a bankrupt has omitted to keep the usual proper and sufficient books of account in the business carried on by him, or has “continued to trade after knowing himself to be insolvent.” These are two of the “facts,” on proof of which the Court must either refuse or suspend his order of discharge, or grant it to him only upon conditions (*post*, p. 941).

(2) The provision that goods in the possession, order, and disposition of a bankrupt, with the consent of the true owner, are part of the property divisible among his creditors, is confined to goods in his trade or business, *i.e.* goods in his order and disposition, “for the purposes of or purposes connected with his trade or business” (1).

(3) A married woman as we have seen (*ante*, p. 901) cannot be made a bankrupt unless trading separately from her husband.

Indispensable conditions.

An act of bankruptcy having been established, certain indispensable conditions are required by sect. 6 of the Bankruptcy Act, 1883, to enable a creditor to petition, and it has been decided that the costs of an abortive execution cannot be added to the judgment debt, for the purpose of making up the amount of debt required by the Act, to support a bankruptcy petition (2). There must be a liquidated debt or debts, payable immediately, or at some certain future time, amounting to £50. The act of bankruptcy to ground the petition must have occurred within three months before the presentation of the petition; and, lastly, the debtor must be domiciled in England, or within a year before petition presented have ordinarily resided or had a dwelling-house or place of business in England.

It has been decided that the burden of proof is on the petitioning creditor to prove that the debtor's domicile is English, and that his residence has been such as to give the High Court jurisdiction. But, if there is no reason to suppose that the debtor will dispute that his domicile is English, or that the petition is presented in the right Court, the petitioning creditor need not in the first instance adduce evidence of either of those facts (3) (see as to domicile generally, *post*, p. 1002).

(1) Per Cotton, L.J., in *Colonial Bank v. Whinney*, 30 Ch. D., at p. 274. Sects. 28 and 44, Bankruptcy Act, 1883. See also as to exemption of tools of trade, sect. 44, sub-sect. 2; and see sects. 57 and 64 as to carrying

on the bankrupt's trade.

(2) *In re Long. Ex parte Cuddeford*, 20 Q. B. D. 316. And see as to refusal of tender of debt, *Re Lowe*, 62 L. T. 263.

(3) *Ex parte Barne. In re Barne*,



The Court has power to go behind a judgment, at the instance of the debtor, upon the hearing of a petition; but will not do so on the mere suggestion by the debtor that the judgment debt is bad, if it considers that the objections raised are frivolous <sup>(1)</sup>.

Power to  
go behind  
judgment.

Domicile or residence in Ireland or Scotland is not sufficient to give the Court jurisdiction, and the petitioning creditor must be prepared to prove residence or domicil in England if there be any dispute <sup>(2)</sup>.

The petition having been presented, a day is appointed for it to be heard, and the Court, if satisfied with the proof of the debt, service of the petition, and act of bankruptcy, makes a receiving order, unless it thinks fit to stay or adjourn the petition. If not satisfied with such proof it may dismiss the petition, and this may also be done if the debtor shows he can pay his debts, or for other sufficient cause <sup>(3)</sup>. If the debtor dies before service of the petition the Court may order service on his personal representatives, or on such other person as it may think fit <sup>(4)</sup>. The effect of a receiving order is to constitute an official receiver of the Court receiver of the debtor's property, and to stop all remedies of the creditors against the debtor's person or property other than those given by the Act, the rights of secured creditors, however, being expressly saved <sup>(5)</sup>. Upon the presentation of a debtor's petition the Court forthwith makes a receiving order <sup>(6)</sup>, but it has been decided that, where debtors who are neither partners nor joint traders join in presenting a bankruptcy petition, the petition is an abuse of the process of the Court, and the Court has jurisdiction to refuse to make a joint receiving order <sup>(7)</sup>.

Receiving  
order.

16 Q. B. D. 522, explaining *Ex parte Cunningham*, 13 Q. B. D. 418; *Ex parte Hecquard*, 24 Q. B. D. 71.

<sup>(1)</sup> See *Ex parte Kibble. Re Onslow*, L. R. 10 Ch. 373; *Ex parte Lennox*, 16 Q. B. D. 315; *Ex parte Lipscombe*, 4 Mor. 43; *Re Saville*, 4 Mor. 277; *Re Flatau*, 22 Q. B. D. 83.

<sup>(2)</sup> *Ex parte Cunningham*, 13 Q. B. D. 418; *Ex parte Barne*, 16 Q. B. D. 522; *Re Norris. Ex parte Reynolds*, 5 Mor. 111.

<sup>(3)</sup> Bankruptcy Act, 1883, sect. 7.

<sup>(4)</sup> Bankruptcy Rules, 1890, r. 12.

<sup>(5)</sup> Bankruptcy Act, 1883, sect. 9.

<sup>(6)</sup> Bankruptcy Act, 1883, sect. 8; Bankruptcy Rule 157. The Rules

regulating the practice on petitions are Rules 143-169.

<sup>(7)</sup> *In re Bond*, 21 Q. B. D. 17; see as to effect of receiving order: *Re Wray*, 36 Ch. D. 138; *Rhodes v. Dawson*, 16 Q. B. D. 548; *Re Hobson*, 33 Ch. D. 493; see, as to jurisdiction to rescind receiving order: *Re Hester*, 22 Q. B. D. 632; *Re Dixon*, 37 W. R. 161. The Court had no power to order service of receiving order out of jurisdiction: *Re Wendt*, 22 Q. B. D. 733. But now by Bankruptcy Rules 1890, r. 17, the Court has power when a receiving order has been made to order service abroad of the receiving order, the order of adjudication, &c.

## CHAPTER II.

## CONSEQUENCES OF RECEIVING ORDER.

Conse-  
quences of  
receiving  
order.

The receiving order once made, whether it has been obtained by the hostile action of a creditor or creditors, or by the debtor seeking the protection of the Court <sup>(1)</sup>, entails certain immediate and inevitable consequences, viz. :—

1. The debtor must submit a statement of his affairs.
2. There must be a general meeting of creditors.
3. The debtor must submit himself to a public examination.

Public  
examina-  
tion.

The provisions of the Bankruptcy Acts, 1883 and 1890, with regard to the public examination of the debtor are as follows <sup>(2)</sup>:—

(1) Where the Court makes a receiving order it shall hold a public sitting, on a day to be appointed by the Court, for the examination of the debtor, and the debtor shall attend thereat, and shall be examined as to his conduct, dealings, and property. It is however provided by the Bankruptcy Act of 1890 <sup>(3)</sup>, that where the debtor is a lunatic, or suffers from any such mental or physical affliction or disability as in the opinion of the Court makes him unfit to attend his public examination, the Court may make an order dispensing with such examination, or directing that the debtor be examined on such terms, in such manner, and at such place as to the Court seems expedient.

(2) The examination shall be held as soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs.

(3) The Court may adjourn the examination from time to time.

(4) Any creditor who has tendered a proof, or his representative authorized in writing, may question the debtor concerning his affairs and the causes of his failure.

<sup>(1)</sup> Bankruptcy Act, sects. 15, 16, 17; Brett's Bankruptcy, p. 68; *Ex parte Postmaster-General. Re Bonham*, 10 Ch. D. 595. It must be borne in mind that a petition once presented cannot be withdrawn with-

out the leave of the Court: Sects. 7 and 8.

<sup>(2)</sup> 46 & 47 Vict. c. 52, s. 17, amended by 53 & 54 Vict. c. 71, s. 2.

<sup>(3)</sup> 53 & 54 Vict. c. 71, s. 2.

(5) The official receiver shall take part in the examination of the debtor; and for the purpose thereof, if specially authorized by the Board of Trade, may employ a solicitor with or without counsel.

Public  
examina-  
tion.

(6) If a trustee is appointed before the conclusion of the examination, he may take part therein.

(7) The Court may put such questions to the debtor as it may think expedient.

(8) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over either to or by the debtor and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times.

(9) When the Court is of opinion that the affairs of the debtor have been sufficiently investigated, it shall, by order, declare that his examination is concluded, but such order shall not be made until after the day appointed for the first meeting of creditors.

It has been decided that a solicitor who appears at a bankruptcy court for a creditor who has tendered a proof is "the creditor's representative" within the meaning of this section, and is therefore not entitled to question the debtor without being authorized in writing and producing his authority if required by the Court to do so <sup>(1)</sup>.

At the first meeting the creditors consider whether they shall entertain any composition or scheme of arrangement which may be proposed by the debtor, or whether he ought to be made bankrupt <sup>(2)</sup>.

First  
meeting.

The great changes which have been introduced into the law of Bankruptcy with regard to composition with creditors must now be noticed.

Provisions to enable debtors to make arrangements with their creditors, so as to avoid the stigma of bankruptcy, were first introduced by the Bankruptcy Act, 1849. Further changes were subsequently made by the Acts of 1861, 1868, and 1869, by the last of which were introduced liquidations and composi-

<sup>(1)</sup> *The Queen v. The Registrar of the Greenwich County Court*, 15 Q. B. D. 54. See as to examination of bankrupt solicitor being used as

evidence in proceedings before committee of Incorporated Law Society, *Re a Solicitor*, 25 Q. B. D. 17.

<sup>(2)</sup> Bankruptcy Act, sect. 15.

tions. The provisions of the Bankruptcy Act, 1883, with regard to compositions and arrangements with creditors have been materially altered by the Bankruptcy Act, 1890. Sect. 18 of the former Act is now repealed, and sect. 3 of the Act of 1890 which is substituted for it contains the following provisions with regard to compositions and arrangements with creditors.

Composi-  
tions and  
schemes of  
arrange-  
ment.

Where a debtor intends to make a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, he must within four days of submitting his statement of affairs, or within such time thereafter as the official receiver may fix, lodge with the official receiver a proposal in writing, signed by him. This proposal must embody the terms of the composition or scheme which he is desirous of submitting for the consideration of his creditors, and set out particulars of any sureties or securities proposed.

The official receiver is then to hold a meeting of creditors, *before the public examination of the debtor is concluded*, and send to each creditor, before the meeting, a copy of the debtor's proposal with a report thereon. If at that meeting a majority in number and three-fourths in value of all the creditors who have proved resolve to accept the proposal, the proposal is to be deemed to be duly accepted by the creditors, and when approved by the Court is to be binding on all the creditors <sup>(1)</sup>.

The debtor or the official receiver may, after the proposal is accepted by the creditors, apply to the court to approve it. Notice of the time appointed for hearing the application must be given to each creditor who has proved <sup>(2)</sup>.

The Court must, before approving the proposal, hear a report of the official receiver as to the terms thereof, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.

The Court is bound to refuse its approval if it is of opinion that the terms of the proposal are not reasonable, or are not calculated to benefit the general body of creditors, or in any

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(1) The debtor may at the meeting amend the terms of his proposal, if the amendment is, in the opinion of the official receiver, calculated to benefit the general body of creditors.

Any creditor who has proved his debt may assent to or dissent from the proposal by a letter, in the prescribed form, addressed to the official receiver so as to be received by him not later than the day preceding the meeting, and any such assent or

dissent shall have effect as if the creditor had been present and had voted at the meeting.

(2) The application is not to be heard until after the conclusion of the public examination of the debtor. Any creditor who has proved may be heard by the Court in opposition to the application, notwithstanding that he may at a meeting of creditors have voted for the acceptance of the proposal.

case in which the Court is required, where the debtor is adjudged bankrupt to refuse his discharge (*post*, p. 941).

Composition or scheme of arrangement.

The Court is also bound, if any facts are proved on proof of which it would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt (*post*, p. 941), to refuse to approve the proposal, unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the unsecured debts provable against the debtor's estate <sup>(1)</sup>.

If the Court approves the proposal, the approval may be testified by the seal of the Court being attached to the instrument containing the terms of the proposed composition or scheme, or by the terms being embodied in an order of the Court.

A composition or scheme duly accepted and approved is to be binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy. It is not, however, to release the debtor from any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as a co-respondent in a matrimonial cause, except to such an extent and under such conditions as the Court expressly orders in respect of such liability <sup>(2)</sup>.

The provisions of a composition or scheme may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application is to be deemed a contempt of Court.

The Court has power in certain cases to annul a composition or scheme and adjudge the debtor a bankrupt. The provisions of sect. 3, sub-sect. 15 of the Bankruptcy Act, 1890, on this subject are as follows :—

If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by the official receiver or the trustee, or by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme, but

<sup>(1)</sup> In any other case the Court may either approve or refuse to approve the proposal.

<sup>(2)</sup> Sect. 3, sub-sect. 12. Sub-sect. 13 provides that a certificate of the

official receiver that a composition or scheme has been duly accepted and approved shall, in the absence of fraud, be conclusive as to its validity.

without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done, under or in pursuance of the composition or scheme. Where a debtor is adjudged bankrupt under this sub-section, any debt provable in other respects, which has been contracted before the adjudication, shall be provable in the bankruptcy <sup>(1)</sup>.

Approval  
of composi-  
tion or  
scheme.

No composition or scheme is to be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt (*post*, p. 932).

The acceptance by a creditor of a composition or scheme is not to release any person who under the Bankruptcy Acts, 1883 and 1890, would not be released by an order of discharge if the debtor had been adjudged bankrupt.

Composi-  
tions and  
schemes of  
arrange-  
ment.

The provisions of the present law with regard to the approval of the Court are of a stringent character.

Under the Act of 1869, the only question that had to be considered was whether the resolutions were passed *bond fide*, and if so they must be registered. "The registrar," said the Court of Appeal, speaking of the system under that Act, "has nothing to do with the wisdom of the resolutions; he cannot reject them on the ground of any amount of foolishness in them."

But under the present Acts the Court has to consider the composition or scheme judicially <sup>(2)</sup>.

The Court, in determining whether or no it will approve a composition or scheme, will not be influenced by the wishes of the creditors. It will exercise a sort of parental control in dealing with the cases which come before it, protecting the true interests of the creditors (as well as considering the debtor's conduct), and saving them from their carelessness and recklessness, by taking the control of the debtor and his property out of their hands <sup>(3)</sup>.

(1) 53 & 54 Vict. c. 71, sect. 3, sub-sect. 15. Sub-sects. 16 and 17 provide as follows:—

If under or in pursuance of a composition or scheme a trustee is appointed to administer the debtor's property or manage his business, or to distribute the composition, sect. 27 and Part V. of the principal Act shall apply as if the trustee were a trustee in a bankruptcy, and as if the terms "bankruptcy," "bankrupt," and "order of adjudication," included respectively a composition or scheme of arrangement, a compounding or

arranging debtor, and order approving the composition or scheme.

Part III. of the principal Act shall, so far as the nature of the case and the terms of the composition or scheme admit, apply thereto, the same interpretation being given to the words "trustee," "bankruptcy," "bankrupt," and "order of adjudication," as in the last preceding sub-section.

(2) See *Ex parte Clark*, 13 Q. B. D. 426, where it was held that the scheme was unreasonable.

(3) See among other cases, *Ex parte Campbell. Re Wallace*, 15 Q. B. D.

In the case of a scheme, too, the Court will not grant its approval unless the scheme gives the creditors something more than they would have had in bankruptcy <sup>(1)</sup>, and accordingly a scheme which failed to do so, and which also attempted to incorporate sundry powers given by the Act to the Court, was rejected by the Court. The same debtor afterwards proposed a second scheme, of which the official receiver reported to the Court that it was reasonable and calculated to benefit the general body of the creditors. The scheme provided that the debtor should, prior to the approval of the scheme, consent to judgment being entered against him by the trustee for the full amount of the debts provable under it. It then went on to provide that the judgment so entered up should have the same effect, and be enforceable in the same manner and to the same extent, as though the debtor had been adjudged bankrupt under the proceedings, and the Court had granted him an order of discharge conditional upon his consenting to judgment being entered against him by the trustee, and such judgment had been entered accordingly. The Court of Appeal decided that the parties had no power to incorporate with the scheme of arrangement the powers which the Court possessed in bankruptcy; and further that the well-known rule applied that the consent of the parties could not confer upon the Court a jurisdiction which it did not otherwise possess; accordingly, that, as the judgment could not be enforced either at common law or under the Act or by agreement, the scheme was illusory and of no effect, and that it ought not to be approved by the Court <sup>(2)</sup>.

Approval  
of com-  
position or  
scheme.

In a very recent case where the debtors were merchants, having a house in Manchester and a house in Chili, the great bulk of the assets consisted of property in South America. A scheme was proposed under which the South American assets were to be sold for about their value to Mr. H., one of the Chilian partners, who was to pay the purchase-money in four years by quarterly instalments. The only security was that the trustee was to insure Mr. H.'s life for £10,000. The scheme was approved by the committee of inspection, who were competent men of business and creditors to a large amount, and by an experienced accountant who had been sent to Chili to

213; *Ex parte Reed and Bowen*, 17 Q. B. D. 244; *Ex parte Kearsley*, 18 Q. B. D. 168; *Re Staniar. Roberts & Co.*, 20 Q. B. D. 544; *Re Browne and Wingrove*, W. N. (1890) 131.

<sup>(1)</sup> *Ex parte Bischoffsheim. Re Aylmer*, 19 Q. B. D. 33.

<sup>(2)</sup> *Re Aylmer. Ex parte Bischoffsheim*, 20 Q. B. D. 258.

Approval  
of com-  
position or  
scheme.

examine the affairs of the Chilian house, and the official receiver reported in its favour.

The judge before whom the question at first came refused to approve the scheme, but the Queen's Bench Division overruled this decision. The question they said was "commercial rather than legal," and they laid down the principle that a scheme approved by a proper committee and sanctioned by the Board of Trade ought not to be rejected without some very adequate reason. They pointed out that there was no general doctrine that the payment of the purchase-money must be guaranteed. The obvious feature of the scheme, the Court said, was that it depended upon the capacity and honesty of Mr. H., and, as the majority of creditors who were well qualified to judge for themselves had come to the conclusion that he was both honest and capable, the scheme ought to be approved "as being reasonable and for the general benefit of the creditors" <sup>(1)</sup>.

Composi-  
tion or  
scheme.

A composition, or scheme, duly accepted by the creditors and approved by the Court, is, subject to the exception of certain liabilities (*ante*, p. 907), binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy <sup>(2)</sup>. "Since the Statute 6 Geo. 4, c. 16," it was said by the judges of the Court of Appeal in a recent case <sup>(3)</sup>, "till the year 1883, the legislature has been engaged in the effort to exhaust every conceivable possibility of liability under which a bankrupt might be, to make it provable in bankruptcy against his estate and relieve the bankrupt for the future from any liability in respect thereof. . . . A composition is to be in satisfaction of the debts due to the creditors from the debtor, and these words seem to show that the composition is to be co-extensive with the obligations of the debtor. . . . We have here given to the expression 'debt' a far larger meaning than its strict and primary one, so that it includes not merely present debts, but liabilities that may mature into debts. In the same way the expression 'creditors' must in many cases in the Act receive a large interpretation, so as to include every one in relation to whom there is a debt or liability on the part of the debtor." On the other hand, the acceptance and approval of a composition or scheme, is not binding on any creditor so far as regards a debt or liability from which the debtor would not be discharged by an order of discharge in

<sup>(1)</sup> *Re Stanier, Roberts & Co. Ex parte Smith (Trustee) and Another*, 20 Q. B. D. 544.

3 (12).

<sup>(3)</sup> *Flint v. Barnard*, 22 Q. B. D. 90, 92, 94.

<sup>(2)</sup> Bankruptcy Act, 1890, sect.



bankruptcy (see *post*, p. 943), unless the individual creditor assents to it <sup>(1)</sup>.

Composi-  
tion or  
scheme.

A composition or scheme of arrangement, may be effected after adjudication as well as before <sup>(2)</sup>.

It will be observed from the foregoing observations that the power of creditors to insist upon a composition or scheme of arrangement under the statute has been greatly curtailed by the power conferred on the Court of deciding whether it will approve or refuse to approve. And, even in the case of compositions outside the Bankruptcy Act, a great change has been introduced into the law by the Deeds of Arrangement Act, 1887 <sup>(3)</sup>, which, except as specially provided, came into operation on the 1st of January, 1888. By this Act, which is modelled on the lines of the Bills of Sale Acts (*ante*, p. 332), a deed of arrangement will be void unless registered in the prescribed manner within seven clear days after its first execution by the debtor or any creditor <sup>(4)</sup>. A true copy of the deed and of every schedule and inventory thereto must be filed within the seven days with a verifying affidavit, and a further affidavit by the debtor of the total estimated amount of property and liabilities included in the deed, the total amount of the composition (if any) payable, and the names and addresses of his creditors.

Deeds of  
Arrange-  
ment Act,  
1887.

The deed of arrangement must also be duly stamped.

It must, however, be borne in mind, that the Act applies only to private arrangements with creditors and not to statutory deeds of arrangement, as they might be called, *i.e.* deeds

(1) Bankruptcy Act, 1883, sect. 19.

(2) Bankruptcy Act, sect. 23. The words "by special resolution" in this section are now repealed by the Bankruptcy Act, 1890. See as to the power of the Court to enforce the payment of a composition agreed to under sect. 23 of the Bankruptcy Act, 1883, *after* an adjudication of bankruptcy: *Re Lazarus. Ex parte Godfrey*, 18 Q. B. D. 670.

(3) 50 & 51 Vict. c. 57, amended as to Ireland by the Deed of Arrangement Amendment Act (53 & 54 Vict. c. 24), which came into operation 4th September, 1890. It has been decided that a deed of assignment executed by a debtor for the benefit of his creditors, though not stamped or registered in accordance with the provisions of this Act, may be given in evidence as proof of an act of bankruptcy committed by the debtor: *Ex parte Heapy. In re*

*Hollinshead*, 60 L. T. 273. See *Re Batten*, 22 Q. B. D. 685, as to alteration not invalidating deed. See as to returns to Board of Trade, Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 25, under which rules have been issued, W. N. Dec. 13, 1890, and see on the subject of deeds of arrangement generally, Robson on Deeds of Arrangement.

(4) The term "deed of arrangement" includes an assignment of property, a deed of or agreement for a composition, and, where the creditors obtain any control over the debtor's property or business, any instrument of the nature of a letter of license or deed of inspectorship or agreement, for carrying on or winding up a business with a view to payment of debts—whether under seal or not (sect. 4)—executed after the commencement of the Act (1st January, 1888).

executed in pursuance of resolutions of creditors under any Bankruptcy Act.

Essentials  
of composition  
arrangement.

The essence of a composition arrangement between a debtor and his creditor is equality between the creditors, and consequently a creditor who has executed a composition deed is entitled to repudiate it, if he afterwards discovers that other creditors have been induced to execute the deed by means of a secret bargain for a payment to them in excess of the composition, even if the bargain was made after his own execution of the deed. The principle applies even if the additional payment is to be made at the expense of a third person, provided that the bargain is made with the debtor's knowledge, and it applies whether the composition arrangement is made under the provisions of a statute or not <sup>(1)</sup>.

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(1) *Ex parte Milner. In re Milner*, 15 Q. B. D. 605.

## CHAPTER III.

## ADJUDICATION AND ITS CONSEQUENCES.

The making of a receiving order does not divest the debtor of his property. In the language of the Roman Law there is no *cessio bonorum* <sup>(1)</sup>, and this is also the case where a composition or scheme is carried, unless provided for by the resolution.

Effect of  
adjudica-  
tion.

As soon, however, as adjudication takes place, the debtor's property "becomes divisible among his creditors, and vests in a trustee."

A debtor shall be adjudged bankrupt by the Court if the creditors at the first meeting so resolve, or if they pass no resolution, or if they do not meet, or if a composition or scheme is not accepted or approved within fourteen days after the conclusion of the public examination of the debtor, or such further time as the Court may allow <sup>(2)</sup>. The Court has also power to make an order of adjudication :—

(a.) Where a composition or scheme has been approved, but default is made, or the Court thinks that it cannot proceed without injustice or undue delay, or that the approval of the Court has been obtained by fraud <sup>(3)</sup>.

(b.) Where the debtor fails in performing the duties imposed upon him with relation to his statement of affairs <sup>(4)</sup>.

(c.) On the debtor's own application <sup>(5)</sup>.

(d.) Where there is no quorum of creditors present at the first meeting, or one adjournment thereof, or the official receiver satisfies the Court that the debtor has absconded, or does not intend to propose a composition or scheme <sup>(6)</sup>.

(e.) Where a composition or scheme is not accepted by the creditors at the first meeting or at one adjournment thereof <sup>(7)</sup>.

It has been decided by the Court of Appeal that the provision of the Act enabling the Court to adjudge the debtor a bankrupt, and annul a composition or scheme apply to a case in which the debtor has in fact (though without any fraud) misled the

(1) *Ex parte Postmaster-General*, 10 Ch. D. 595; *Rhodes v. Dawson*, 16 Q. B. D. 548.

(2) Bankruptcy Act, 1883, sect. 20.

(3) Bankruptcy Act, 1890, sect. 3, sub-sect. 15; Bankruptcy Act, 1883,

sect. 23 (3); see as to discharge of surety, *Walton v. Cook*, 40 Ch. D. 325.

(4) Bankruptcy Act, 1883, sect. 16.

(5) Bankruptcy Rule 190.

(6) Bankruptcy Rule 191.

(7) Bankruptcy Rule, 192.

creditors as to the value of his assets comprised in an assignment to a trustee for the creditors, and the creditors have consequently received a less dividend than the debtor led them to expect. The Court will not exercise this discretionary power of adjudicating the debtor a bankrupt, if it can see plainly that the creditors can gain nothing by an adjudication, but the Court will exercise the power if there is only a probability that the creditors will gain by an adjudication <sup>(1)</sup>.

(*f.*) Where a composition or scheme is not accepted by the creditors at the first meeting or at one adjournment thereof, the Court may, on the application of the official receiver, or of any person interested, adjudge the debtor bankrupt.

(*g.*) Where the public examination of a debtor is adjourned *sine die*, and the debtor has not previously been adjudged bankrupt, the Court may forthwith, and without any notice to the debtor, adjudge him bankrupt <sup>(2)</sup>.

Trustee  
and com-  
mittee of  
inspection.

The debtor having been adjudged a bankrupt, it becomes necessary to have a trustee of his property, and the choice of a fit person may be made by the creditors, or, if they so resolve, by the committee of inspection <sup>(3)</sup>. This committee may consist of not more than five nor less than three of the creditors or the holders of general proxies or powers of attorney from creditors, to be elected by the creditors at any meeting <sup>(4)</sup>. The Board of Trade may object to the appointment of a trustee, and he must in all cases give security to their satisfaction <sup>(5)</sup>. If the creditors do not appoint a trustee, the Board of Trade may make the appointment. The official receiver is trustee in small bankruptcies and in administrations of estates of deceased insolvents (see *post*, pp. 950, 951), and is also trustee in ordinary bankruptcies until a trustee is appointed, and during any vacancy in the office <sup>(6)</sup>. The powers and duties of trustees in bankruptcy will be considered later (*post*, p. 933).

Duties of  
debtor

Before proceeding to consider the consequences of adjudication to the bankrupt personally, and to his property, it should be noted that every debtor against whom a receiving order is made is bound, on pain of being punished for contempt of

<sup>(1)</sup> *Ex parte Moon*, 19 Q. B. D. 669.

<sup>(2)</sup> Bankruptcy Rules, 1890, 15, 16.

<sup>(3)</sup> Bankruptcy Act, 1883, sect. 21, sub-sect. (1).

<sup>(4)</sup> Bankruptcy Act, 1883, sect. 22. The section provides regulations as to meetings, &c., of the committee, and enables the Board of Trade to supply its place where none is elected; see

also Bankruptcy Rule 337.

<sup>(5)</sup> Bankruptcy Act, 1883, sect. 21, sub-sect. 2; see *Re Stovold*, 37 W. R. 511; *Re Martin*, 21 Q. B. D. 29.

<sup>(6)</sup> Bankruptcy Act, 1883, sect. 21, sub-sect. 6; sect. 121; sect. 125, sub-sect. 5; sect. 54; sects. 70 and 87. In the case of small bankruptcies, however, the creditors may, if they choose, elect a trustee of their own.

Court, if he wilfully fail so to do, to attend the first meeting and be examined as the meeting may require, and also to make full discovery of his property, and conform to the requirements of the official receiver in relation thereto, and is also bound, if adjudicated bankrupt, to aid in the realisation of his property and its distribution among his creditors <sup>(1)</sup>. Very wide powers are given to the Court to enforce obedience and facilitate discovery of property and the carrying out of the objects of the Act, including in certain cases a power of arrest <sup>(2)</sup>, and including also power to summon for examination the debtor, or his wife, or any person known or suspected to have in his possession any property of the debtor, or to be indebted to him, or deemed by the Court to be capable of giving information as to the debtor or his estate, with ancillary provisions for compelling attendance, answers, and production of documents <sup>(3)</sup>. These examinations are commonly called private sittings, and, being of a somewhat inquisitorial character, it has been held that they cannot be had in administrations of deceased insolvents' estates (*post*, p. 951), nor under a composition or scheme even by agreement <sup>(4)</sup>.

We have now to consider what are the consequences resulting from an adjudication in bankruptcy. These consequences may be considered (1) as they affect the bankrupt personally, and (2) as they affect his estate. Consequences of adjudication.

(A.) *As regards the debtor personally.*—The legislature, applying to matters of a public character the principle expressed by the late Sir George Jessel, that “a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people” <sup>(5)</sup>, has provided that bankruptcy shall disqualify a man from:—

- (a.) Sitting or voting in the House of Lords, or on any committee thereof, or being elected as a peer of Scotland or Ireland to sit and vote in the House of Lords.
- (b.) Being elected to, or sitting or voting in, the House of Commons, or on any committee thereof.

(1) Bankruptcy Act, sect. 24.

(2) Bankruptcy Act, sect. 25.

(3) Bankruptcy Act, sect. 27; Bankruptcy Rule 88; and see *Re Bradbrook*, 23 Q. B. D. 226.

(4) *Re Hewitt*, 15 Q. B. D. 159; *Ex parte Whinney*. *Re Grant*, 17 Q. B. D. 238; *Re Aylmer*. *Ex parte Bischoffsheim*, 4 Mor. 153. Formerly these inquiries were conducted without the presence of the registrar unless

specially asked for. But now the registrar is always present during the examination, it having been held that a man could not be convicted of perjury for a false statement made while the registrar was not present, as the statement was not made before the Court: *R. v. Lloyd*, 19 Q. B. D. 213.

(5) *Re Barker's Trusts*, 1 Ch. D. 43.

- (c.) Being appointed or acting as a justice of the peace.
- (d.) Being elected to or holding or exercising the office of mayor, alderman, or councillor.
- (e.) Being elected to or holding or exercising the office of guardian of the poor, overseer of the poor, member of a sanitary authority, or member of a school board, highway board, burial board, or select vestry <sup>(1)</sup>.

The Bankruptcy Act, 1890, sect. 9, has added to this list of disqualifications, the disqualification for being elected to or holding or executing the office of a member of a county council.

The disqualification to which a bankrupt is subject under this section will however be removed if:—

- (a.) The adjudication of bankruptcy against him is annulled; or if
- (b.) The bankrupt obtains from the Court his discharge with a certificate to the effect that his bankruptcy was caused by “misfortune without any misconduct on his part.”

And it is provided by the Bankruptcy Act, 1890, sect. 9, that no such disqualification shall exceed a period of five years from the date of any discharge which may have been, or may thereafter be, granted under the Bankruptcy Act, 1883, or the Bankruptcy Act, 1890.

“Misfortune without misconduct.”

The meaning of the words “misfortune without any misconduct on his part” was commented upon and illustrated by the Court of Appeal in a recent case in which the circumstances were as follows:—

A husband had instituted a suit for a divorce against his wife and several co-respondents on the ground of her adultery, with the result at the trial, that the petition was dismissed, and the debtor was ordered to pay all the costs of the proceedings. The means of the husband both before and after the commencement of the divorce proceedings were wholly inadequate to pay the costs so incurred, and he was adjudged a bankrupt on the petition of one of the co-respondents <sup>(2)</sup>. The question then arose whether the case fell within the meaning of the words “misfortune without any misconduct on his part.”

The Court of Appeal pointed out that the fact of the bringing and carrying on of the divorce suit was a matter which was entirely within the control of the debtor, and that when the

(1) Bankruptcy Act, 1883, sect. 32; and see Brett's Bankruptcy, p. 67, *et seq.*, p. 63, where the previous enactments are considered.

(2) *In re Lord Colin Campbell*, 20 Q. B. D. 816; and see *Re Burgess*, 4 Morrell, 190; 35 W. R. 702.

bankruptcy was not solely the result of some accident over which, or over the direct conducting causes of which, the debtor had no control, it could not be said to arise from misfortune.

"The word 'misfortune,' " said the Court, "is as familiar in common language as the thing itself is in life, but this Act of Parliament has for the first time used the word to express a legal conception, *i.e.* a notion capable of such exact definition that it can be predicated of any event, as a matter, not of opinion, but of judicial decision, that it is or is not a misfortune. . . . For the purposes of the present discussion, 'misfortune' is equivalent to some adverse event not immediately dependent on the actions or will of him who suffers from it, and of so improbable a character that no prudent man would take it into his calculations in reference to the interests either of himself or of others. A man who was reduced to poverty by an act of God destroying his property might be said to have suffered from misfortune without any misconduct on his part. The prosperity of Job was overthrown by the simultaneous concurrence of four unusual events, the attack of the Sabeans, the inroad of the Chaldeans, the fire from heaven, and the wind from the wilderness; and his consequent poverty might have been regarded as in no way disqualifying him from holding any office of trust in his tribe. But, on the other hand, a man who gambles, so that if he is unsuccessful he cannot pay his creditors, does not owe his situation to misfortune without misconduct, though he would probably say that he had been unfortunate in his play" (1).

"Misfortune without misconduct."

The Court has a discretionary power, subject to appeal in case of refusal, to grant or withhold the certificate, and the burden of proof that he comes within the exceptions is thrown by the Act upon the bankrupt (2).

A bankrupt also becomes liable to punishment for neglect of the duties imposed upon him by the Act (*ante*, p. 914), as well as for certain statutory misdemeanours, which will be noticed hereafter (*post*, p. 953).

B. As regards the property of a bankrupt, we have already seen (*ante*, p. 913), that upon adjudication it vests in the trustee. The property which so vests comprises in a sweeping enumeration all property which belongs to, or is vested in the bankrupt at the commencement of the bankruptcy, or is acquired by or has devolved upon him before his discharge

Property passing to the trustee

(1) *Re Lord Colin Campbell*, 20 Q. B. D. 816.

(2) Bankruptcy Act, sect. 32, sub-sects. 1 and 2.

(except trust property, and except the tools of his trade and necessary apparel, and bedding, of himself, his wife, and children to a total value of £20), and also the capacity for exercising all powers exercisable by the bankrupt for his own benefit, at the commencement of the bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice. It has been decided, however, that a husband's right to administer to his wife's estate does not pass to his trustee <sup>(1)</sup>.

It has already been pointed out how the Court follows trust property (*ante*, p. 532). On a somewhat similar principle it was long ago decided by Lord Eldon in the celebrated case of *Ex parte Waring*, that if both drawer and acceptor of a bill of exchange became bankrupt, and property had been appropriated by what has been termed a "rough equity," to cover the acceptance, the bill holder was entitled to have the property appropriated for his benefit <sup>(2)</sup>.

Property  
which does  
not pass  
to the  
trustee.

Other cases there are in which, from the peculiar circumstances, the property does not pass to the trustee. It was decided in one case that money *bonâ fide* paid by a debtor to his solicitor to defray counsel's fees and other legal expenses in opposing proceedings in bankruptcy that have been commenced against him cannot, should adjudication follow, be recovered from the solicitor by the trustee in bankruptcy, even although the solicitor knew of the acts of bankruptcy on which the proceedings were based. Cave, J., in delivering judgment, said that it might just as well be said that, if a bankrupt goes into a baker's shop who knows that he has committed an act of bankruptcy, and pays for a loaf of bread, the trustee can recover the money from the baker <sup>(3)</sup>. A prominent example of property *not* passing to the trustee is found in the personal earnings of the bankrupt—"that which the bankrupt earns in daily labour to support life" <sup>(4)</sup>.

(<sup>1</sup>) Sect. 44. *In the Goods of Jane Turner*, 12 P. D. 18. "Property" is defined as including "money, goods, things in action, land, and every description of property, real and personal, in England or elsewhere, and obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property": Bankruptcy Act, 1883, sect. 168. Powers are given to enable the trustee to deal with certain kinds of property, e.g. stock and shares, by

sect. 50, sub-sects. 3-6 of the Bankruptcy Act, 1883; see *Ex parte Sibeth*, 14 Q. B. D. 417; *Ex parte Whitehead*, 14 Q. B. D. 419; *Nichols to Nixey*, 29 Ch. D. 1005.

(<sup>2</sup>) 19 Ves. 344: *Ex parte Dever. Re Suse*, 14 Q. B. D. 611; *Re Brown*, 60 L. T. 397; and see *Richard v. Jenkins*, 17 Q. B. D. 544; 18 Q. B. D. 451.

(<sup>3</sup>) *In re Sinclair. Ex parte Payne*, 15 Q. B. D. 616.

(<sup>4</sup>) *Emden v. Carte*, 17 Ch. D. 768; and see *Ex parte Banks. Re*



So, again, the profits of a benefice, where the bankrupt is a beneficed clergyman, and the pay or salary of an officer of the army or navy, or of a civil servant, do not pass to the trustee. Powers, however, are conferred upon the Court to order the sequestration of the one, or the payment of a portion of the other, to the trustee <sup>(1)</sup>. And a like order may be made where the bankrupt is in receipt of any salary or income or is entitled to half-pay, pension, or compensation from the Treasury. The bankrupt, however, must have a legal or equitable claim to the payment, and in the case of "income" it must be in the nature of "salary" <sup>(2)</sup>.

Property which does not pass to the trustee.

Again, damages in an action for a personal tort recovered by an undischarged bankrupt do not pass to his trustee, though, if a bankrupt has accumulated money received as damages for a personal tort, and invested it in property, the trustee may be entitled to the property <sup>(3)</sup>.

"If," said Lord Justice James, in a case in which this point was decided, "he could not sue for damages in respect of a personal wrong, such as the seduction of his daughter, or anything like that, the Courts of the realm would be closed to him for all practical purposes. I believe that never in the whole course of the administration has an order been made such as that which is now asked for, that is, an order intercepting the damages recovered for a personal wrong done to an undischarged bankrupt."

A case involving a question with reference to the property of a married woman came before the Court of Appeal in 1886 <sup>(4)</sup>. The Married Women's Property Act, 1882 <sup>(5)</sup>, contains a provision to which reference has previously been made, that every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws, in the same way as if she were a *feme sole*. In the present case the lady had traded separately from her husband, and had become a bankrupt. She had under her marriage

Married women's property.

*Dowling*, 4 Ch. D. 689; *Knight v. Burgess*, 33 L. J. (Ch.) 727; *Jameson v. The Brick and Stone Company*, 4 Q. B. D. 208; and see *Brett's Bankruptcy*, pp. 94 and 95.

<sup>(1)</sup> Bankruptcy Act, 1883, sect. 52; sect. 53, sub-sect. (1).

<sup>(2)</sup> Bankruptcy Act, sect. 53, sub-sect. 2; *Ex parte Wicks*, 17 Ch. D. 70. Thus, no order can be made in respect of professional earnings. *Ex parte Benwell. Re Hutton*, 14 Q. B. D. 301, nor of a voluntary allowance, *Ex*

*parte Webber*. 18 Q. B. D. 111. An order was made in the case of a pension of a retired judge, *Ex parte Huggins*, 21 Ch. D. 85, and of a commercial traveller engaged at £100 a year payable weekly: *Re Brindley*, 4 Mor. 104.

<sup>(3)</sup> *Ex parte Vine. In re Wilson*, 8 Ch. D. 364.

<sup>(4)</sup> *Ex parte Gilchrist. In re Armstrong*, 17 Q. B. D. 521

<sup>(5)</sup> 45 & 46 Vict. c. 75, s. 1.

settlement a general power of appointment by deed or will (*ante*, p. 176), and the question was whether the Court would order her to execute a deed appointing two houses to the trustee in bankruptcy for the benefit of her creditors. The Court decided that the expression "separate property" included only what would have been her property were she unmarried, and that accordingly the general power of appointment was not included.

Doctrine of  
reputed  
ownership.

It will be seen that the section vesting in the trustee the property of the bankrupt is very wide, and includes almost everything in which the bankrupt has a beneficial interest. But the Act goes further, and in certain cases confers on the trustee property which has never belonged to the bankrupt, or, which, though once his, he has transferred to others.

Thus all goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, *in his trade or business*, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, will pass to the trustee, with the exception of things in action, other than debts due, or growing due to the bankrupt in the course of his trade or business <sup>(1)</sup>.

In order that the doctrine of "reputed ownership" should apply, not only must the goods be in the bankrupt's order and disposition in his trade or business, but the bankrupt must also be the sole possessor <sup>(2)</sup>, and the goods must be in his possession, order, or disposition, under such circumstances as to give rise to the reputation of ownership on the part of the bankrupt, but such reputation may be excluded by the custom of a particular trade <sup>(3)</sup>. And to all this—to the possession, order, and disposition, and to the reputation of ownership—the true owner must consent, which consent may be put an end to by demand of or attempt to take possession before notice of an available act of bankruptcy <sup>(4)</sup>.

<sup>(1)</sup> Bankruptcy Act, sect. 44, sub-sect. 2 (iii.) Shares are things in action, and therefore excluded from the operation of the doctrine of reputed ownership: *Colonial Bank v. Whinney*, 11 App. Cas. 426. The Bills of Sale Act, 1890 (53 & 54 Vict. c. 53, *ante*, p. 334), sect. 2, provides that "nothing in this Act shall affect the operation of sect. 44 of the Bankruptcy Act, 1883, in respect of any goods comprised in any such instrument as is hereinbefore described, if such goods would but for this Act be

goods within the meaning of sub-sect. 3 of that section."

<sup>(2)</sup> *Re Bainbridge. Ex parte Fletcher*, 8 Ch. D. 218; following *Ex parte Dorman*, L. R. 8 Ch. 51.

<sup>(3)</sup> Brett's Bankruptcy, p. 95.

<sup>(4)</sup> *Ex parte Cohen. Re Sparke*, L. R. 7 Ch. 20; *Ex parte Wright. Re Arnold*, 3 Ch. D. 70; *Ex parte Montagu. Re O'Brien*, 1 Ch. D. 554; *Re Eslick. Ex parte Phillips*, 4 Ch. D. 496. An available act of bankruptcy is one available for a bankruptcy petition at the date of the presenta-

Again the Act provides that every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money, in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt *on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same*, be deemed fraudulent and void as against the trustee in the bankruptcy. It is, however, provided that the section shall not affect the right of any person making title in good faith and for valuable consideration through or *under a creditor of the bankrupt* <sup>(1)</sup>.

The question now arises, given that the transaction between the bankrupt and his creditor takes place within the time fixed by the law, is it an act of fraudulent preference or no? In order to determine this problem the Court must in each case consider, as a matter of fact, what was the substantial, effectual, or dominant motive (not necessarily the sole motive) of the bankrupt in making the payment or transfer, to prefer the creditor <sup>(2)</sup>. If the Court comes to the conclusion that the

Fraudulent preference.

tion of the petition on which the receiving order is made (Bankruptcy Act, 1883, sect. 168), *i.e.*, one committed within three months prior to such presentation; see, as to order and disposition, *Re Tillett*, 60 L. T. 575; *Re Davis*, 37 W. R. 141.

<sup>(1)</sup> Bankruptcy Act, 1883, sect. 48. Under the Act of 1869 it was necessary, in order to avoid the preference, that the debtor should actually become a bankrupt within three months after.

According to the decision of the House of Lords, in *Butcher v. Stead*, L. R. 7 H. L. Ca. 839, on the corresponding section of the Bankruptcy Act, 1869, sect. 92, which attracted much attention, a creditor paid by the bankrupt himself, who could show that he was a payee in good faith and for value, and that he had no notice or knowledge of anything to invalidate the transaction, was entitled to retain the money paid him; but the present section has altered the law upon this subject, and protects not creditors but only persons who make title in good faith and for

value under a creditor of the bankrupt; see *Re Fleming*, 60 L. T. 154. Sect. 20 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), provides for relation back in case of a receiving order made under sect. 103 of the Bankruptcy Act, 1883 (*ante*, p. 900), as follows:—

“Where a receiving order is made against a judgment debtor in pursuance of sect. 103 of the principal Act, the bankruptcy of the debtor shall be deemed to have relation back to and to commence at the time of the order, or, if the bankrupt is proved to have committed any previous act of bankruptcy, then to have relation back to and to commence at the time of the first of the acts of bankruptcy proved to have been committed by the debtor within three months next preceding the date of the order; and sect. 48 of the principal Act shall apply as if the debtor had been adjudged bankrupt on a bankruptcy petition presented at the date of the receiving order.”

<sup>(2)</sup> *Ex parte Griffith. Re Wilcoxon*, 23 Ch. D. 69.

Fraudulent  
preference.

bankrupt's real motive was not to prefer the creditor, but, *e.g.*, to save himself from exposure or from a criminal prosecution, or to prevent a surety for the bankrupt being required to pay, the payment or transfer is not a fraudulent preference <sup>(1)</sup>.

In yet another instance the trustee may take property which has passed to persons other than the bankrupt, for in the case of any settlement of property with the three exceptions of:—

Settle-  
ments.

(1) A settlement made before and in consideration of marriage, or;

(2) A settlement made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or;

(3) A settlement on or for the wife or children of the settlor of property, which has accrued to the settlor after the marriage in right of his wife, it is provided by sect. 47 of the Act that the settlement shall be void against the trustee in bankruptcy if the settlor becomes bankrupt within *two* years after the date of the settlement.

The same section provides that in case the settlor becomes bankrupt at any subsequent time within *ten* years after the date of the settlement, the settlement is to be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in the property had passed to the trustee of the settlement on its execution.

Covenants  
for future  
settle-  
ments.

Again "any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children, of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy" <sup>(2)</sup>.

<sup>(1)</sup> *Ex parte Taylor. Re Goldsmid*, 18 Q. B. D. 295; *Re Mills. Ex parte Official Receiver*, 5 Mor. 55. Formerly the principal question considered was whether there was real pressure by the creditor, but the substantial question now is as above stated, and the old cases are of little avail, now that the doctrine of fraudulent preference has been put into definite statutory shape: *Ex parte Griffith, Re Wilcoxon*,

*ubi sup.*

It must further be noted that in order to constitute a fraudulent preference the person preferred must be strictly a creditor of the bankrupt: *Ex parte Taylor, Re Goldsmid, ubi sup.*; and see *Re Lane*, 23 Q. B. D. 77.

<sup>(2)</sup> Bankruptcy Act, 1883, sect. 47; see *Ex parte Mercer*, 17 Q. B. D. 290; *Re Lowndes*, 18 Q. B. D. 677; *Re*

It must be borne in mind that the provisions of this important section are not, like those of the corresponding provision in the Act of 1869, confined to traders. It was decided under the former law that a general covenant to pay a sum of money, not specifically "ear marked" to trustees of a marriage settlement<sup>(1)</sup> or to settle a vested share of property liable to be divested by the exercise of a power of appointment, were not invalid<sup>(2)</sup>, and these decisions apply to the present law.

The law as to what is a settlement within the meaning of the Act, has been judicially summed up as follows: "A settlement in the ordinary sense of the word is intended. The transaction must be in the nature of a settlement, though it may be affected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person. Thus a purchase by the father of shares, which are registered in the son's name, and upon which the son receives the dividends, is within the statute. But where the gift is of money to be expended at once, the transaction is not within sect. 47 of the Act of 1883"<sup>(3)</sup>.

What is a  
settlement.

*Gould*, 19 Q. B. D. 92; and see as to whether the provisions of this section are retrospective, *Re Ashcroft*, 19 Q. B. D. 186; and as to the costs of the trustees of the settlement, *Re Holden*, 20 Q. B. D. 43.

L. R. 8 Ch. 718.

<sup>(2)</sup> *Re Andrews*, 7 Ch. D. 635; and see *Holt v. Everall*, 2 Ch. D. 266; *Ex parte Huxtable*. *Re Conibeer*, 3 Ch. D. 54.

<sup>(3)</sup> Cave, J., in *Re Player*. *Ex parte Harvey*, 15 Q. B. D. (C.A.) 687.

<sup>(1)</sup> *Ex parte Bishop*. *Re Tonnies*,

## CHAPTER IV.

## COMMENCEMENT OF BANKRUPTCY—DISCLAIMER.

Commence-  
ment of  
bank-  
ruptcy.

It will have been observed that the phrase "the commencement of the bankruptcy" has been used, and it now becomes necessary to inquire when a bankruptcy commences.

It has long been an established principle in bankruptcy, that in order to protect creditors against dealings by the bankrupt with his property which might defeat their just claims, the bankruptcy is not to be dated as from the order of adjudication, but is to "relate back," or, in other words, its commencement is to date from some prior point of time when an act of bankruptcy had been committed. Under the Act of 1869, this period might be twelve months.

Relation  
back of  
bank-  
ruptcy.

Under the Bankruptcy Act, 1883, the bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, is to be deemed to have *relation back to, and to commence at*, the time of the act of bankruptcy being committed, on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the *first* of the acts of bankruptcy proved to have been committed by the bankrupt *within three months* next preceding the date of the presentation of the bankruptcy petition <sup>(1)</sup>. It is also provided by the Bankruptcy Act 1890 (sect. 20), that where a receiving order is made against a judgment debtor in pursuance of sect. 103 of the Act of 1883, (*ante*, p. 900), the bankruptcy of the debtor shall be deemed to have relation back to and to commence at the time of the order, or, if the bankrupt is proved to have committed any previous act of bankruptcy, then to have relation back to and to com-

(1) Bankruptcy Act, 1883, sect. 43. The section, however, goes on to provide that no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of

the petitioning creditor. The doctrine of relation back does not affect the Crown: *Ex parte Postmaster-General. Re Bonham*, 10 Ch. D. 595; and see sect. 150, Bankruptcy Act, 1883.

mence at the time of the first of the acts of bankruptcy proved to have been committed by the debtor within three months next preceding the date of the order. It is also provided that sect. 48 of the Act of 1883 (with regard to fraudulent preference, *ante*, p. 921) shall apply as if the debtor had been adjudged bankrupt on a bankruptcy petition presented at the date of the receiving order.

As in engineering, a *datum* line is assumed from which all the heights and depths are calculated, so, as was stated by the Court of Appeal, the legislature has for the general convenience of the administration of the bankrupt's estate, fixed the act of bankruptcy on which the adjudication is founded, as a *datum* line for the commencement of the trustee's title, leaving it open to the trustee to enlarge his title by proving, if he can, earlier acts of bankruptcy (1).

The principle of the relation back of the bankruptcy is, however, very materially qualified by the provisions of a subsequent section, which "protects" certain specified transactions if they take place *bonâ fide* and without notice before the date of the receiving order. These protected transactions are:—

Protected  
trans-  
actions.

- (1.) Any payment *by* the bankrupt to any of his creditors;
- (2.) Any payment or delivery *to* the bankrupt;
- (3.) Any conveyance or assignment *by* the bankrupt for valuable consideration;
- (4.) Any contract, dealing, or transaction *by or with* the bankrupt for valuable consideration—

Provided that both the following conditions are complied with, namely—

- (1.) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, must take place *before the date of the receiving order*; and
- (2.) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, must not have had at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, *notice of any available act of bankruptcy committed by the bankrupt before that time* (2).

(1) *Ex parte Learoyd, Re Foulds*, 10 Ch. D. 11; *Brett's Bankruptcy*, p. 90; and see *Sharp v. McHenry*, 38 Ch. D. 427.

(2) Bankruptcy Act, sect. 49. An available act of bankruptcy is one available for a petition at the date of the presentation of the petition on

which the receiving order is made (sect. 168), *i.e.* one committed within three months prior to such presentation; see *Re Chapman*, 13 Q. B. D. 747; *McEntire v. Potter & Co.*, 22 Q. B. D. 438 (a case decided on the Irish Bankruptcy Law).

Disclaimer. But suppose that the bankrupt's property, or a portion of it, is worthless, or worse than worthless, unprofitable or even onerous, what is called in a phrase borrowed from the Roman law, a "*damnosa hereditas*."

In such a case the Act gives a power to the trustee to disclaim such property and thus relieve himself and the bankrupt's estate from the liabilities which its possession would entail. This is conferred by sect. 55 of the Bankruptcy Act, 1883, now amended by sect. 13 of the Bankruptcy Act, 1890, which considerably simplifies the power of disclaimer possessed by the trustee under the previous law, and embodies in statutory form the result of many previous decisions <sup>(1)</sup>.

It provides that when any part of the property of the bankrupt consists of: (1) land of any tenure burdened with onerous covenants; (2) shares or stock in companies; (3) unprofitable contracts; or, (4) any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, subject to the provisions of the section, by writing signed by him, at any time within twelve months after the first appointment of a trustee, disclaim the property. The period of twelve months may be extended by the Court.

The effect of the disclaimer is to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and to discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but the disclaimer is not (except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability) to affect the rights or liabilities of any other person <sup>(2)</sup>.

The importance of this provision will be well seen from the fact that where the bankrupt's property is of leasehold tenure a trustee who neglected to disclaim would become personally

<sup>(1)</sup> *E.g., Ex parte Walton, Re Levy*, 17 Ch. D. 746: see as to disclaimer of property held of the Crown, *In re Thomas*, 21 Q. B. D. 380.

<sup>(2)</sup> A further limit of time is given in case any such property shall not have come to the knowledge of the trustee within one month after the

first appointment of a trustee. In this case the trustee may disclaim such property at any time within twelve months after he first becomes aware of it. The period of twelve months may be extended by the Court: 53 & 54 Vict. c. 78, sect. 13.



liable for payment of rent and performance of covenants <sup>(1)</sup>. Disclaimer. The leave of the Court is necessary for disclaiming a lease, and wide powers are given of imposing terms and conditions <sup>(2)</sup>. Any person interested in the property may compel the trustee to decide within twenty-eight days after the receipt of the application, or such extended period as the Court may allow, whether he will disclaim or not, on pain of losing his right to disclaim, and the Court has also powers of rescinding contracts made with the bankrupt and awarding damages as well as of vesting disclaimed property in persons interested therein. Underlessees of leasehold property and mortgagees by demise (see *ante*, p. 99) are liable to be excluded from all interest therein unless they take a vesting order on the terms of accepting all the liabilities and obligations of the bankrupt in respect of the property <sup>(3)</sup>. The Court has however power, if it thinks fit, to modify the terms of the vesting order so as to make the person in whose favour it may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order.

And to prevent, as far as possible, any hardship on third persons by reason of a disclaimer, it is further provided that any person injured by the disclaimer shall be deemed to be a creditor of the bankrupt to the extent of the injury <sup>(4)</sup>.

<sup>(1)</sup> *Ex parte Dressler, Re Solomon*, 9 Ch. D. 252; *Wilson v. Wallani*, 5 Ex. D. 155; *Titterton v. Cooper*, 9 Q. B. D. 473.

<sup>(2)</sup> Bankruptcy Act, sect. 55, subsect. 3. No leave, however, is necessary where the bankrupt has not sublet, or assigned the lease, or created any mortgage, or charge on it; and (a) the rent reserved and real value of the property are less than £20 per annum, or (b) there is a summary administration under sect. 121; or (c) the trustee serves the lessor with notice of his intention to disclaim, and the lessor does not within seven days require him to bring the matter before the Court: Bankruptcy Rule 320. The principles on which compensation will be granted to the landlord are discussed in *Ex parte Isherwood, Re Knight*, 22 Ch. D. 384; *Ex parte Arnal, Re Witton*, 24 Ch. D. 26; *Ex parte Good, Re Salkeld*, 13 Q. B. D. 731; see also *Re Finley*, 21 Q. B. D.

475; *Re Briton*, 37 W. R. 621; *Re Morgan*, 22 Q. B. D. 592.

<sup>(3)</sup> Bankruptcy Act, 1883, sect. 55, sub-sects. 4, 5, 6, amended by 53 & 54 Vict. c. 71, sect. 13. The lessor may obtain a vesting order or an order for possession where a vesting order is declined by a mortgagee or underlessee, or there is no one alone or jointly liable with the bankrupt to perform the lessee's covenants: *Re Cook, Ex parte Shilson*, 20 Q. B. D. 343; see as to the Crown, *Re Thomas*, 21 Q. B. D., 380; as to several distinct properties, *Re Whitaker*, 21 Q. B. D. 261; and as to rights of sub-lessee, *Re Finley*, 21 Q. B. D. 475, and see *Re Gee*, 24 Q. B. D. 65; *Re Smith*, 25 Q. B. D. 536.

<sup>(4)</sup> Bankruptcy Act, sect. 55, subsect. 7. The measure of damages in respect of an agreement for a lease was held to be the difference between the rent reserved and the rent which the premises were fairly worth for the

Disclaimer. The Bankruptcy Rules, 1890, provide (rule 69) that a lease may be disclaimed without the leave of the Court in any of the following cases, viz. :—

- i. Where the bankrupt has not sub-let the demised premises or any part thereof or created a mortgage or charge upon the lease ; and
  - (a.) The rent reserved and real value of the property leased, as ascertained by the property tax assessment, are less than £20 per annum ; or
  - (b.) The estate is administered under the provisions of sect. 121 of the Act of 1883 (*post*, p. 950) ; or
  - (c.) The trustee serves the lessor with notice of his intention to disclaim, and the lessor does not within seven days after the receipt of such notice give notice to the trustee requiring the matter to be brought before the Court.
- ii. Where the bankrupt has sublet the demised premises or created a mortgage or charge upon the lease, and the trustee serves the lessor and the sub-lessee or the mortgagees with notice of his intention to disclaim, and neither the lessor nor the sub-lessee or the mortgagees, or any of them, within fourteen days after the receipt of such notice, require or requires the matter to be brought before the Court.

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remainder of the term : *Ex parte Llynvi Coal and Iron Company, Re Hide*, L. R. 7 Ch. 28 ; Brett's Bankruptcy Law, pp. 119, 120. See also

*Ex parte Blake, Re McEwan*, 11 Ch. D. 572 ; *Ex parte Corbett, Re Shand*, 14 Ch. D. 122.

## CHAPTER V.

## RIGHTS OF CREDITORS.

We now pass to the consideration of the rights and remedies of creditors of the bankrupt. Creditors may be either secured<sup>(1)</sup> or unsecured. In the case of secured creditors the Secured  
creditors.  
bankruptcy of the debtor in no way affects their right to realise or deal with their securities. If the security, therefore, is sufficient, the creditor holding it may pay himself thereout just as he might have done had there been no bankruptcy<sup>(2)</sup>.

If, on the other hand, the security be insufficient, he may either realise and prove against the estate for the balance, or give up his security and prove for the whole debt, or value the security in his affidavit of proof against the estate, and be entitled to dividend on the balance after deducting the assessed value<sup>(3)</sup>.

It should be borne in mind that it is only securities over the *property of the debtor* that need be valued, the test being, would the security, if given up, go to augment the debtor's estate<sup>(4)</sup>.

But although secured creditors are thus favoured, persons will not be allowed to become secured creditors after the rights and remedies of the general creditors have been suspended by the making of a receiving order. Thus a creditor will get no benefit from an execution against goods or land, or an attachment of debts due to a debtor unless the execution or attachment has been *completed*, i.e. unless the goods have been seized

(<sup>1</sup>) A "secured creditor" is defined to mean "a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as security for a debt due to him from the debtor": Bankruptcy Act, 1883, sect. 168. See *Re Dickinson*, 22 Q. B. D. 187; *Re Perkins*, 24 Q. B. D. 613.

(<sup>2</sup>) Bankruptcy Act, 1883, sect. 9, sub-sect. 2.

(<sup>3</sup>) Bankruptcy Act, 1883, Schedule II., rules 9, 10, 11. The penalty for non-compliance with these rules is exclusion from dividend: Schedule II.,

rule 16. Powers are given to the trustee to redeem the security where it has been valued, and of amendment of valuation: Schedule II., rules 12-15. If a secured creditor desires to petition, he must surrender or value his security: Bankruptcy Act, 1883, sect. 6, sub-sect. 2. Securities given to creditors must be stated in the statement of affairs: sect. 16, sub-sect. 1.

(<sup>4</sup>) *Ex parte West Riding Union Banking Co.*, *Re Turner*, 19 Ch. D. 105.

and sold, the land seized or a receiver appointed, or the debt received, *before receiving order and without notice* of a petition or of the commission of an available act of bankruptcy <sup>(1)</sup>. Further, where goods are seized in execution, if, before sale or the completion of the execution by the receipt or recovery of the full amount of the levy, notice be served on the sheriff that a receiving order has been made against the debtor, the sheriff must on request deliver the goods, and any money seized or received in part satisfaction of the execution to the official receiver. The costs of the execution are, however, a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods or an adequate part of them for the purpose of satisfying the charge <sup>(2)</sup>.

It is also provided that where under an execution in respect of a judgment for a sum exceeding £20, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days. If within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff must pay the balance to the official receiver, or, as the case may be, to the trustee, who shall be entitled to retain it as against the execution creditor <sup>(3)</sup>.

Rent.

The Bankruptcy Acts preserve but limit the right of a landlord or other person to whom rent is due. Sect. 42 of the Bankruptcy Act, 1883 (as amended by sect. 28 of the Bankruptcy Act, 1890) provides that the landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent

<sup>(1)</sup> Bankruptcy Act, 1883, sect. 45. See *Re Dickinson*, 22 Q. B. D. 187; *Butler v. Wearing*, 17 Q. B. D. 182; *In re Hobson*, 33 Ch. D. 493.

<sup>(2)</sup> Bankruptcy Act, 1890, sect. 11, sub-sect. 1.

<sup>(3)</sup> Bankruptcy Act, 1890, sect. 11, sub-sect. 2: *Re Ludmore*, 13 Q. B. D. 415; *Re Pearce*, 14 Q. B. D. 966; *Re Holland*, 15 Q. B. D. 48; *Heathcote v. Livesley*, 19 Q. B. D. 285; *Re Woodham*, 20 Q. B. D. 40. An execution is not invalid, because it is an act of bankruptcy, and a purchaser in good faith from the sheriff gets a

good title to the goods against the trustee: sect. 46, sub-sect. 3. It is provided by sect. 12 of the Bankruptcy Act, 1890, that where any goods of a debtor are taken in execution, and the sheriff has notice of another execution or other executions, the Court shall not consider an application for leave to sell privately until the notice directed by rules of court has been given to the other execution creditor or creditors, who may appear before the Court and be heard upon the application.

due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for six months' rent accrued due prior to the date of the order of adjudication. The landlord or other person to whom rent may be due from the bankrupt is, however, allowed to prove under the bankruptcy for the surplus due for which the distress may not have been available. It is also provided that when any rent or other payment falls due at stated periods, and the receiving order is made at any time other than one of such periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order, as if the rent or payment grew due from day to day <sup>(1)</sup>.

Unsecured creditors on the other hand, have, after a receiving order, no remedy against the person or property of the debtor, except as provided by the Act <sup>(2)</sup>. The remedy given is by proof of debt <sup>(3)</sup>. The right of proof is very comprehensive, the evident intention of the legislature, as a great judge said, being to bring within the Act all possible contracts that have been broken, so as to discharge the bankrupt <sup>(4)</sup>.

Unsecured  
creditors.

Proof of  
debt.

Two classes of claims are however excepted. The Act declares that—

Exceptions.

(1.) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy.

(2.) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

With these exceptions, all debts and liabilities <sup>(5)</sup>, present or

<sup>(1)</sup> Bankruptcy Act, 1883, s. 42, Sch. I. r. 19. The rent must be "a real not a mere sham" rent, and not a mere device for giving a mortgagee an additional security: *Ex parte Williams, Re Thompson*, 7 Ch. D. 138; *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335; *Ex parte Jackson, Re Bowes*, 14 Ch. D. 725; *Ex parte Voisey, Re Knight*, 21 Ch. D. 442; where the previous cases are discussed. The rent also must be payable in respect of a tenancy or something analogous to it: *Ex parte Hill, Re Roberts*, 6 Ch. D. 63; *Ex parte Birmingham and Staffordshire Gas Light Co., Re Fanshawe*, L. R. 11 Eq.

615; *Ex parte Harrison, Re Peake*, 13 Q. B. D. 753; and see as to "order of adjudication": *Re Fryman*, 38 Ch. D. 468.

<sup>(2)</sup> Bankruptcy Act, 1883, s. 9 (1). No action or legal proceedings can be commenced after receiving order, except by leave of the Court.

<sup>(3)</sup> Bankruptcy Act, 1883, s. 39, and Sch. II.; Bankruptcy Rules 219-231.

<sup>(4)</sup> *Per Mellish, L.J.*, in *Ex parte Waters, Re Hoyle*, L. R. 8 Ch. 562.

<sup>(5)</sup> "Liability" includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express

future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, are to be deemed to be debts provable in bankruptcy <sup>(1)</sup>.

Mutual  
credits,  
debts, &c.

Where there have been mutual credits, debts, or other dealings between a debtor and any other person proving or claiming to prove a debt under the receiving order, an account is to be taken on each side, and the balance of account only paid to the estate or proved against it, as the case may be <sup>(2)</sup>. The account will be taken as a general rule at the date of the commencement of the bankruptcy <sup>(3)</sup>. The right of set-off given by the Act is an absolute statutory rule independent of the option of the parties, and cannot be excluded by agreement <sup>(4)</sup>; but it applies only where the respective claims will result in pecuniary liabilities so that a balance can be struck <sup>(5)</sup>.

Preferential  
debts.

All debts proved will be paid *pari passu*, with the exception of certain debts which are treated by the law in the distribution of the property of the bankrupt as "preferential debts," and paid in priority to all others.

These are :—

(a) Rates which have become due and payable within twelve months before receiving order, and assessed and other taxes assessed up to the 5th of April, prior to receiving order, and not exceeding one year's assessment ;

(b) Wages or salary of any clerk or servant, for services

or implied covenant, contract, agreement, or undertaking, whether or not the breach occurs or is or is not likely to occur, or capable of occurring before the debtor's discharge, and any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in payment of money or money's worth, whether the payment is fixed or unliquidated, present or future, certain or contingent, capable of valuation by fixed rules, or as a matter of opinion : Bankruptcy Act, s. 37, sub-s. 8.

<sup>(1)</sup> Bankruptcy Act, 1883, s. 37, sub-ss. 1-3. Provisions for estimating debts and liabilities are contained in sub-ss. 4-7. The decisions as to provable debts will be found classified in Brett's Bankruptcy, pp. 72-74, to which may be added as to costs : *Ex parte Bluck*, 57 L. T. 419 ; *Vint v. Hudspith*, 30 Ch. D. 24 ; as to the

liability of an assignee to indemnify a lessee : *Hardy v. Fothergill*, 13 App. Cas. 351 ; as to contingent liabilities : *Re Dodds*, 25 Q. B. D. 529 ; and as to proof for counsel's fees in the bankruptcy of a solicitor : *Re Clift*, 38 W. R. 688.

<sup>(2)</sup> Bankruptcy Act, 1883, s. 38. A person cannot claim the benefit of this provision, if at the time of giving credit to the debtor, he had notice of the commission of an available act of bankruptcy.

<sup>(3)</sup> *Re Gillespie, Ex parte Reid*, 14 Q. B. D. 963.

<sup>(4)</sup> *Ex parte Fletcher, Re Vaughan*, 6 Ch. D. 350 ; *Ex parte Barnett, Re Devezze*, L. R. 9 Ch. 293.

<sup>(5)</sup> *Eberle's Hotel Co. v. Jonas*, 18 Q. B. D. 459. For a discussion of the law of set-off : see *Peat v. Jones*, 8 Q. B. D. 147.

rendered during four months before receiving order, not exceeding £50 <sup>(1)</sup>.

(c) Wages of any labourer or workman <sup>(2)</sup> not exceeding £25, in respect of services rendered to the bankrupt during two months before receiving order. Apprentices or articulated clerks also, may in a proper case, obtain from the trustee or Court, a cancellation or transfer of their articles and a return of premium <sup>(3)</sup>.

In administering the property of bankrupt partners, a very important rule is observed, which was first laid down by Lord King and elaborated by Lord Loughborough, towards the close of the last century, and is now embodied in sect. 40, sub-sect. 3 of the Bankruptcy Act. This rule is that the joint estate is applicable in the first instance to payment of the joint debts and the separate estate of each partner to the payment of his separate debts, any surplus of the separate estates being dealt with as joint estate, and any surplus of the joint estate as part of the respective separate estates in proportion to the interest of the partners in the joint estate. The estate of a partner who becomes bankrupt is not liable for partnership debts contracted after the date of his bankruptcy <sup>(4)</sup>.

The trustee, in whom on adjudication all the property of the debtor will vest <sup>(5)</sup>, will forthwith proceed to take possession thereof <sup>(6)</sup>, and, if necessary, a warrant may be granted to enable such property to be seized <sup>(7)</sup>. Various powers are given him to enable him to carry out his duties under the Act, some of which are exercisable of his own motion, others only with the permission of the committee of inspection <sup>(8)</sup>.

Powers  
and duties  
of trustees.

(1) Preferential Payments in Bankruptcy Act, 1888, s. 1; *Re Smith*, 17 Q. B. D. 4; *Re Williams*, 36 Ch. D. 573.

(2) The wages may be payable either for time or piece work: Preferential Payments in Bankruptcy Act, 1888, s. 1, sub-s. (1) (c); and if the contract is for a lump sum, the labourer will have priority for the whole or a proportionate part, as the Court may decide. For Form of Proof: see Bankruptcy Rule 220, form 73.

(3) Bankruptcy Act, 1883, s. 41.

(4) 53 & 54 Vict. c. 39, sect. 36 (3); see Lindley on Partnership, 5th ed. p. 622, *et seq.*, and for summary of sections on bankruptcy of partners, and cases thereon: Brett's Bankruptcy, p. 81, *et seq.*, and *Re Hind*, 23 L. R. Ir. 217; and as to joint and

separate dividends: see Bankruptcy Act, 1883, s. 59.

(5) Bankruptcy Act, 1883, s. 20. The official receiver will be trustee until one is appointed, and upon appointment the property will pass to the trustee so appointed, and from one trustee to another: s. 54.

(6) Bankruptcy Act, 1883, s. 50, sub-ss. 1 and 2.

(7) Bankruptcy Act, 1883, s. 51.

(8) The following are the powers of the trustee *without* permission of the committee of inspection:—

He may: (1) sell; (2) give receipts; (3) prove (in bankruptcy of another) for any debt due to the bankrupt; (4) exercise powers and execute deeds; (5) deal with property of which bankrupt is beneficially entitled as tenant in tail.

The powers of the trustee exercis-

The trustee having realised sufficient property, will, after providing for costs, proceed to declare and distribute a dividend or dividends, giving due notice thereof in the *Gazette* <sup>(1)</sup>. Creditors who have failed to prove before declaration of a dividend will not be entitled to disturb such dividend, but will be entitled to be paid any dividends they have missed out of any moneys in the hands of the trustee before they are applied in payment of any subsequent dividend <sup>(2)</sup>. The Bankruptcy Act, 1890, provides <sup>(3)</sup> that when a debt has been proved upon a debtor's estate under the principal Act, and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding five per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full. When the trustee has realized the whole of the property, or so much as he and the committee of inspection think can be realized without needlessly protracting the trusteeship, he will declare a final dividend <sup>(4)</sup>.

The bankrupt will be entitled to any surplus after payment of debts and costs in full <sup>(5)</sup>.

Division of  
property  
in bank-  
ruptcy.

The consideration of this portion of our work may be appropriately concluded by a reference to a recent decision in the House of Lords, where the general principles of the law as to the division of property in bankruptcy were eloquently summarized as follows:—

“The bankruptcy law as it now exists, seems to depend on

able *with* the permission of the committee of inspection, are as follows:—

He may: (1) carry on the bankrupt's business in order to wind it up; (2) bring or defend actions, &c.; (3) employ solicitor or agent; (4) accept as consideration for the sale of the bankrupt's property, money payable at a future time; (5) mortgage or pledge any part of bankrupt's property for payment of his debts; (6) refer to arbitration and compromise claims by and against the estate; (7) divide in its existing form, *in specie* as it is termed, any property which cannot be readily or advantageously sold; (8) appoint bankrupt to manage his business; (9) make the bankrupt an allowance: see Bankruptcy Act, 1883, ss. 56, 57, 64. The permission given by the com-

mittee of inspection in the first seven cases must be a permission to do the particular thing for which permission is sought in the special case (s. 57).

<sup>(1)</sup> Bankruptcy Act, 1883, s. 58. The time for the first dividend, in the absence of satisfactory explanation to the committee of inspection, is four months from the conclusion of the first meeting (sub-s. 2); subsequent dividends, in the absence of sufficient reason to the contrary, are to be declared and distributed at intervals of six months (sub-s. 3). Provision is to be made for creditors residing at a distance: s. 60.

<sup>(2)</sup> Bankruptcy Act, 1883, s. 61.

<sup>(3)</sup> 53 & 54 Vict. c. 71, s. 23.

<sup>(4)</sup> Bankruptcy Act, 1883, s. 62.

<sup>(5)</sup> Bankruptcy Act, 1883, s. 65.



the great principle of equity—the doctrine of equality—that is to say, equality amongst the creditors in the common shipwreck, and justice and humanity to the debtor, if he gives up all his property—everything that he has, for equal distribution amongst his creditors, and has conformed to, and has not violated the provisions of the bankruptcy law.

“The law proceeded tentatively, and struggled by slow degrees from the time at which it was a code to repress and punish those whom the law considered to be criminals and delinquents, until it threw off its barbarisms and became a code of equity and of justice” (1).

The progressive character of the bankruptcy law, Lord FitzGerald went on to say, was well illustrated by the provisions of the Act of 1883.

Its definition of the “property” which is made available for creditors includes “money, goods, things in action, land, and every description of property whether real or personal, and whether situate in England or elsewhere, also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising or incident to property as so defined.” The Act of 1883 in dealing with the proof of claims in respect of contingent liabilities adopts the provisions of the Act of 1869, though possibly in more vigorous language, simplifies the procedure and adds as to contingent claims “capable of resulting in the payment of money, or money’s worth, whether the payment is as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion.” The aim of legislation throughout has been, as far as possible, to carry into practical effect two of the main objects of the bankruptcy law, that all creditors should be entitled to come in and prove, and that the bankrupt should emerge from the bankruptcy free from all liabilities.

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(1) *Hardy v. Fothergill*, 13 App. Cas. 351, 363.

## CHAPTER VI.

## BOARD OF TRADE—OFFICIAL RECEIVER—TRUSTEES.

Mention has already been made more than once of the Board of Trade and of official receivers. One of the cardinal principles of the Act is to separate judicial and administrative functions, and to commit the superintendence of the administrative functions to officers acting under a responsible department of State. The control given to the Board of Trade over the trustees in bankruptcy and over the administration generally of bankrupts' estates, as well as the creation of the official receivers of such estates, are novel and important features of the present bankruptcy system.

Functions  
of the  
Board of  
Trade.

The important powers and duties with which the Board of Trade is thus invested, relate, as Mr. Robson says, not only to the debtor and his estate, but also to the persons entrusted with the administration of the estate, the Board being in fact constituted by the Act the guardian of all moneys realised from the estates of bankrupts until they are distributed amongst the creditors, and invested with a superintending control over the persons entrusted with the realisation and distribution <sup>(1)</sup>.

The functions of the Board of Trade relate to :—

1. The appointment of official receivers, deputy receivers, and other officers. The Bankruptcy Act, 1890 <sup>(2)</sup>, provides that the Board of Trade may by order, *for reasons to be stated therein*, direct in any *special* case that any of its officers mentioned in the order shall be capable of discharging any portion of the duties of the official receiver for the performance of which it is in the opinion of the Board expedient that some person other than the official receiver be appointed, provided that no additional expense be thereby incurred.

2. The appointment of trustees where the creditors fail to appoint.

3. Taking security from and granting certificates to trustees, and security and accounts from special managers <sup>(3)</sup>;

<sup>(1)</sup> Robson on Bankruptcy, 6th ed., p. 56.

<sup>(2)</sup> 53 & 54 Vict. c. 71, sect. 14, Bankruptcy Rules, 1890, 70-72.

<sup>(3)</sup> These may be appointed by the

official receiver, if satisfied that the nature of the debtor's estate or business, or the interests of the creditors generally require it: Bankruptcy Act, 1883, s. 12, sub-s. 1.

4. Receipts, payments, accounts, and audits ;
5. Discharging functions of committee of inspection where none exists <sup>(1)</sup> ;
6. Control over and release of trustees ;
7. Concurrence with the Lord Chancellor in making, revoking, and altering general rules for carrying into effect the objects of the Act ;
8. Dealing with returns from registrars and other officers, and preparing a report to Parliament ;
9. The exercise of certain "transitory powers ;"
10. Gazetting notices <sup>(2)</sup> ;

Functions  
of the  
Board of  
Trade.

Official receivers are officers not only of the Board of Trade, but also of the Courts to which they are attached <sup>(3)</sup>. Their duties relate: (a) to the debtor's conduct; and (b) to the administration of his estate.

Duties of  
official  
receivers.

With regard to the debtor personally, the duties of the official receiver are :—

To investigate or report generally, and with special reference to misdemeanours and circumstances bearing on the subject of discharge, and the punishment of fraudulent debtors, and to take part in public examinations <sup>(4)</sup>.

As regards the estate, the official receiver's duties are :—

(a.) To act as interim receiver and manager, pending the appointment of a trustee ;

(b.) To authorize any special manager who may be appointed to raise money ;

(c.) To summon and preside at the first meetings of creditors ;

(d.) To issue proxies ;

(e.) Report to creditors any proposal made by the debtor ;

(f.) To advertise ;

(g.) To act as trustee during any vacancy <sup>(5)</sup>.

And it was decided by the House of Lords that the official

<sup>(1)</sup> This may be done by the official receiver: Bankruptcy Rule 337.

<sup>(2)</sup> Bankruptcy Act, 1883, ss. 66, 67, 71 ; 21, sub-s. 6 ; 21, sub-s. 2 ; 12 ; 74, 101 ; 22, sub-s. 9 ; 91 ; 127 ; 131 ; amended by sect. 25 of B. A. 1890, so as to include reports of proceedings under Deeds of Arrangement Act, 1887, 153-156, 159-161 ; Bankruptcy Rule, 280. Appeals to the High Court are provided in case of refusal to certify the appointment of a trustee : s. 21, sub-s. 3 ; from deci-

sion as to release of trustee, s. 82, sub-ss. 1 and 2 ; from decision as to unclaimed dividends, s. 162, sub-s. 4. Such appeals must be brought within twenty-one days : s. 139.

<sup>(3)</sup> Sect. 66, sub-sect. 1.

<sup>(4)</sup> Bankruptcy Act, 1883, ss. 68 and 69. They must also assist the debtor in preparing statement of affairs : Bankruptcy Rules 217 and 324.

<sup>(5)</sup> Bankruptcy Act, 1883, s. 70.

Trustees.

receiver, when acting as trustee in a bankruptcy in the interval between the adjudication and the appointment of a trustee, has power to sell the bankrupt's property even though it be not of a perishable nature <sup>(1)</sup>.

Trustees, as we have seen (*ante*, p. 936), are subject to the control of the Board of Trade. Very stringent are the provisions of the Act with reference not only to the furnishing and audit of accounts, but also to the books which are to be kept, and to the payment of all moneys received into an account at the Bank of England, called "the Bankruptcy Estates Account" <sup>(2)</sup>. Nor will a trustee be able to obtain his release unless the Board of Trade are satisfied with his conduct, and after considering a report on his accounts and hearing objectors, determine (subject to appeal to the High Court), to grant it to him <sup>(3)</sup>.

A trustee vacates his office at once if a receiving order is made against him, and he is liable to removal both by the creditors and by the Board of Trade <sup>(4)</sup>. The power of the Board of Trade to remove a trustee extends to any case in which the Board are of opinion that the trustee is, by reason of lunacy, or continued sickness, or absence, incapable of performing his duties, or that his connection with or relation to the bankrupt, or his estate, or any particular creditor, might make it difficult for him to act with impartiality in the interest of the creditors generally, or where in any other matter he has been removed from office on the ground of misconduct <sup>(5)</sup>. He is not allowed to vote directly or indirectly on a question affecting his conduct or remuneration <sup>(6)</sup>, and his conduct in the administration is under the control of the creditors and committee of inspection as well as of the Board of Trade <sup>(7)</sup>, while the bankrupt, his creditors, or any person aggrieved by any act or decision of his may appeal to the Court <sup>(8)</sup>.

<sup>(1)</sup> *Turquand v. Board of Trade*, 11 App. Cas. 286. Rules as to meetings are contained in Schedule I. Duties as to proofs in Schedule II. rr. 22-27. An official receiver has the powers of a receiver of the High Court, Bankruptcy Act, 1883, s. 70, sub-s. 2; and may administer oaths, s. 68, sub-s. 2. See also generally for powers and duties: Bankruptcy Rules 321-339.

<sup>(2)</sup> As to accounting: see Bankruptcy Act, s. 78, and Bankruptcy Rules 289-293, and 308; as to books: s. 80, and Bankruptcy Rules 285-288; as to payment in of moneys:

ss. 74 and 75, Bankruptcy Rules 340 and 341: *Re Nicholson*, 37 W. R. 239; *Re Tatum*, 60 L. T. 896. A trustee must also send to the Board of Trade an annual statement of the proceedings in the bankruptcy: s. 81.

<sup>(3)</sup> Bankruptcy Act, 1883, s. 82.

<sup>(4)</sup> Bankruptcy Act, 1883, ss. 85, 86. Bankruptcy Rules 302, 303, 311.

<sup>(5)</sup> 53 & 54 Vict. c. 71, s. 19.

<sup>(6)</sup> Bankruptcy Act, 1883, s. 88.

<sup>(7)</sup> Bankruptcy Act, 1883, ss. 89, 91. Joint or successive trustees may be appointed: s. 84.

<sup>(8)</sup> Bankruptcy Act, 1883, s. 90.

A trustee may sue or be sued in his official name as trustee of the bankrupt's property (1).

The important subject of the trustee's remuneration is elaborately dealt with by the Bankruptcy Act, 1883, as amended by the Bankruptcy Act, 1890 (2). It is now provided that where creditors appoint any person to be trustee, his remuneration (if any) is to be fixed by an ordinary resolution of the creditors, or if the creditors so resolve by the committee of inspection and shall be in the nature of a *commission or percentage*, of which one part is to be payable on the amount realised by the trustee, after deducting any sums paid to secured creditors out of the proceeds of their securities, and on the other part on the amount distributed in dividend.

The mode in which the costs and charges of trustees, &c., are to be settled is dealt with as follows:—

Where a trustee or manager receives remuneration for his services as such, no payment shall be allowed in his accounts in respect of the performance by any other person of the ordinary duties which are required by statute or rules to be performed by himself.

Where the trustee is a solicitor he may contract that the remuneration for his services as trustee shall include all professional services.

All bills and charges of solicitors, managers, accountants, auctioneers, brokers, and other persons not being trustees, shall be taxed by the prescribed officer, and no payments in respect thereof shall be allowed in the trustee's accounts without proof of such taxation having been made. The taxing master is bound to satisfy himself before passing such bills and charges that the employment of such solicitors and other persons in respect of the particular matters out of which such charges arise has been duly sanctioned *before* the employment except in cases of urgency, and in such cases it must be shown that no undue delay took place in obtaining the sanction.

The Bankruptcy Act of 1890 provides that where a trustee acts *without remuneration* he shall be allowed out of the bankrupt's estate such proper expenses incurred by him in or about the proceedings of the bankruptcy as the creditors may with the sanction of the Board of Trade approve. The general principle that a trustee shall not profit by his trust, is also to some extent here applied as the rules provide that a trustee

(1) Bankruptcy Act, 1883, s. 83. 28 Ch D. 38.

*Leeming v. Lady Murray*, 13 Ch. Div.  
123; *Pooley's Trustee v. Whetham*,

(2) 46 & 47 Vict. c. 52, sects. 72 & 73;  
53 & 54 Vict. c. 71, sect. 15.

carrying on the debtor's business, shall not, without the express sanction of the Court, purchase goods for the carrying on of such business from his employer (if any), or from any person whose connection with the trustee is of such a nature as would result in the trustee obtaining any portion of the profit, if any, arising out of the transaction.

The same Act also contains important provisions enabling creditors to obtain lists of creditors, statement of accounts, and summonses of meetings of creditors.

The Bankruptcy Act, 1890, provides on these subjects as follows:—

Sect. 16. The trustee or official receiver shall, whenever required by any creditor so to do, furnish and transmit to such creditor by post a list of creditors, shewing in such list the amount of the debt due to each of such creditors.

Sect. 17. It shall be lawful for any creditor, with the concurrence of one-sixth of the creditors (including himself), at any time to call upon the trustee or official receiver to furnish and transmit to the creditors a statement of the accounts up to the date of such notice, and the trustee shall, upon receipt of such notice, furnish and transmit such statement of the accounts. Provided, the person at whose instance the accounts are furnished shall deposit with the trustee or official receiver, as the case may be, a sum sufficient to pay the costs of furnishing and transmitting the accounts, such sum to be repaid to him out of the estate if the creditors or the Court so direct.

Sect. 18. It shall be lawful for any creditor, with the concurrence of one-sixth in value of the creditors (including himself), at any time to request the trustee or official receiver to call a meeting of the creditors, and the trustee or official receiver shall call such meeting accordingly within fourteen days. This section also contains a provision, similar to that in the preceding section, with regard to the deposit of a sufficient sum to cover the costs of summoning such meeting.

Provision being thus made for carrying into effect one of the objects of the Bankruptcy Law, viz. the administration and division among his creditors of a bankrupt's property, the Act also provides for the discharge of a debtor who has duly performed the duties imposed upon him from all the liabilities he has incurred, and which were susceptible of proof against his estate. Under the Act of 1869, the Court had a discretion to suspend or withhold the discharge, if on the representation of the creditors it appeared that the bankrupt "had made default in giving up to his creditors the property which he was required

to give up, or that a prosecution had been commenced under the Debtors Act, 1869." If, however, a special resolution had been passed by the creditors, stating that in their opinion, the debtor was not justly to blame, and that they desired that he should be discharged, the bankrupt was entitled to his discharge; he had a right to come to the Court and demand it, and the Court had no discretion to refuse it <sup>(1)</sup>.

Under the present Acts, the duty of granting or refusing a discharge is thrown upon the Court, and there are new and very stringent provisions made with the object that a bankrupt shall not get his discharge unless he has deserved it. The Court is bound to refuse a discharge altogether to a man who has committed a misdemeanour under the Debtors Act, 1869, or the Bankruptcy Act, 1883, or any other misdemeanour connected with the bankruptcy, or any felony connected with his bankruptcy, unless the Court for special reasons otherwise determines <sup>(2)</sup>. The Court is also bound to refuse the discharge, or suspend the discharge for a period of not less than two years, or suspend it until a dividend of not less than ten shillings in the pound has been paid to the creditors, or only grant it subject to the condition of the bankrupt consenting to judgment being entered against him by the official receiver or trustee for any unsatisfied balance of debt to be paid out of future earnings or after-acquired property in such manner, and subject to such conditions as the Court may direct, if any of the following "facts" are proved. These "facts" are:—

Refusal or suspension of order of discharge.

(a) That the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities, unless he satisfies the Court that the fact that the assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible;

(b) That the bankrupt has omitted to keep such books of account as are usual and proper in his business and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy;

(c) That the bankrupt has continued to trade after knowing himself to be insolvent;

<sup>(1)</sup> *In re Hamilton, Ex parte Hamilton*, 9 Ch. D. 694, 697.

<sup>(2)</sup> Bankruptcy Act, 1890, s. 8. Where the adjudication has been under the Bankruptcy Act, 1883, the

bankrupt has a right to have his application for a discharge dealt with under sect. 28 of that Act: *Re Raison*, 39 W. R. 271.

(*d*) That the bankrupt has contracted any debt provable in his bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation of being able to pay it<sup>(1)</sup>;

(*e*) That the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;

(*f*) That the bankrupt has brought on, or contributed to, his bankruptcy by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs;

(*g*) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him;

(*h*) That the bankrupt has within three months preceding the date of the receiving order incurred unjustifiable expense by bringing a frivolous or vexatious action;

(*i*) That the bankrupt has given an undue preference to any of his creditors within three months preceding the date of the receiving order, when unable to pay his debts as they become due;

(*j*) That the bankrupt has within three months preceding the date of the receiving order incurred liabilities with a view of making his assets equal to ten shillings in the pound on the amount of his unsecured liabilities;

(*k*) That the bankrupt has on any previous occasion been adjudged bankrupt, or made a composition or arrangement with his creditors<sup>(2)</sup>;

(*l*) That the bankrupt has been guilty of any fraud or fraudulent breach of trust;

What is ten shillings in the pound? The Bankruptcy Act, 1890, provides in sect. 8 which deals with the subject of the discharge of a bankrupt, that for the purposes of this section a bankrupt's assets shall be deemed of a value equal to ten shillings in the pound on the amount of his unsecured liabilities when the Court is satisfied of one of three things—(1) that the property of the bankrupt has realised, or (2) is likely to realise, or (3), with due care in realisation might have realised, an amount equal to ten shillings in the pound on his unsecured liabilities. A report by the official receiver or the trustee is to

Discharge  
in bank-  
ruptcy.

<sup>(1)</sup> Bankruptcy Act. 1890, s. 8. *Re White*, 14 Q. B. D. 600. The burden of proof is, on this subject, thrown on the bankrupt.

<sup>(2)</sup> All compositions are now within this sub-section by virtue of 50 & 51 Vict. c. 57. Formerly only "statutory" compositions were included.



be treated as *primâ facie* evidence of the amount of such liabilities.

The Court may also refuse or suspend a discharge, or grant it subject to conditions, or refuse its approval to a composition or arrangement if the debtor has, when unable to pay his debts without the property comprised therein, made an ante-nuptial settlement, or has in consideration of marriage contracted to settle on his wife, or children, property, wherein he had not, at the date of the marriage, any estate or interest (not being property in right of his wife), and the Court thinks the settlement or contract was made to defeat or delay creditors, or was unjustifiable, regard being had to the state of the settlor's affairs at the time when it was made <sup>(1)</sup>.

On the hearing of the application for discharge, the Court shall take into consideration a report of the official receiver as to the debtor's conduct <sup>(2)</sup> and affairs, and will hear creditors and the bankrupt may be examined. The powers of the Court to make a "conditional order" of discharge and suspend the order may be exercised concurrently. On the other hand the Court has also an important power of modifying the severity of its order. Sect. 8 of the Bankruptcy Act, 1890, provides that if at any time after the date of any order made under that section the bankrupt shall satisfy the Court that there is no reasonable probability of his being in a position to comply with the terms of such order, the Court may modify the terms of the order, or of any substituted order in such manner and upon such conditions as it may think fit <sup>(3)</sup>.

An order of discharge is not to release the bankrupt from any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as a co-respondent in a matrimonial cause, except to such an extent and under such conditions as the Court expressly orders in respect of such liability <sup>(4)</sup>.

It will be noticed that two of the facts which, if proved, will at least involve suspension of the order, viz. the failure to keep proper books and continuing to trade after knowledge of insolvency, are only applicable to the case of traders. The books

<sup>(1)</sup> Bankruptcy Act, 1883, s. 29.

<sup>(2)</sup> *I.e.* conduct in relation to matters mentioned in sect. 24, as to discovery and realisation of his property: *Board of Trade v. Block*, 13 App. Cas. 570.

<sup>(3)</sup> Bankruptcy Act, 1890, s. 8, sub-s. 7. The application cannot be

heard till the public examination has been concluded: sub-s. 1. The official receiver's report is *primâ facie* evidence against the bankrupt: sub-s. 5. See as to practice: Bankruptcy Rules 235-244.

<sup>(4)</sup> 53 & 54 Vict. c. 71, s. 10.

must shew at once the state of the debtor's business, but need not shew his general financial position, but only the financial position of the business <sup>(1)</sup>.

A bankrupt, who carried on business as a hatter, bought some houses with the intention of selling them at a profit for building purposes, and also incurred liabilities in promoting an hotel company. The transaction with regard to the land was only one single speculation, and the bankrupt had no intention to buy and sell land from time to time or become a speculator in land. He had kept proper books of account in relation to his business as a hatter, but he had kept none in respect of his purchases of houses or of his transactions in relation to the hotel company.

The majority of the Court of Appeal decided that the bankrupt was not required to keep any books relating to the building speculations, and that the omission to keep such books could not be taken into account as a reason for refusing or suspending his order of discharge. Such a construction of the provisions of the statute, the Master of the Rolls said, would revolutionize the social life of England. It would come to this, that everybody in the kingdom must keep books which will "sufficiently disclose his financial position" <sup>(2)</sup>. Before this statute no one ever heard of such a thing, nor was it even suggested until now that a person who is engaged in no business at all, that every man and woman over twenty-one years of age is to keep books which will shew his or her financial position. It seems to me that this would be a revolution, and I cannot agree that that is the meaning of the words. The statute, as I have often said, deals with business matters, and we must give a business meaning to it. In my opinion, the meaning is, that a man in business must keep his books properly, but if his business is one in which it is not usual to keep any books, or if the man is not engaged in business, then he need not keep any books at all."

The Court of Appeal will vary the amount of punishment if the Court below has in awarding punishment taken a wrong view of the facts <sup>(3)</sup>.

A very interesting question with regard to the duties of a debtor to "aid in the realization of his property," came before

Debtor's  
duties.

<sup>(1)</sup> *Ex parte Reed and Bowen*, 17 Q. B. D. 244; *Re Mutton, Ex parte Board of Trade*, 19 Q. B. D. 102.

<sup>(2)</sup> *In re Mutton (or Multon)*, 19 Q. B. D. 102.

<sup>(3)</sup> *Ex parte Castle Mail Packets Co., Re Payne*, 18 Q. B. D. 154. Creditors served with notice of an

appeal by a bankrupt from an order granting him a conditional discharge, will not be allowed their costs of appearing on the hearing of the appeal, when the official receiver or trustee appears: *Ex parte Salaman*, *In re Salaman*, 14 Q. B. D. 936.

the House of Lords in 1888. The facts of that case were as follows:—The principal asset of a bankrupt was a contingent reversionary interest which was saleable if the bankrupt's life were insured. The trustee having requested the bankrupt to submit to a medical examination with a view to a policy being effected, the bankrupt refused to do so without giving any reason, although he had not long before his bankruptcy submitted to such an examination for the purpose of raising money on his interest, and although he admitted that since then he had contracted no disease, and that he knew of no reason why he should not submit to such examination <sup>(1)</sup>. Lord Macnaghten, in delivering judgment, said, "The question is, Was such refusal conduct which ought to have been taken into consideration when the bankrupt applied for his order of discharge? It was urged that the bankrupt had not aided to the utmost of his power, as he was bound to do by sect. 24 sub-sect. 3, in the realization of his property. The answer is, that the proposed policy, though it would have formed a desirable adjunct to his property, and would have enhanced its value, was not, and never could have been in any sense his property. Then it was said that the bankrupt has not complied with sub-sect. 2. He was bound to do all such acts and things in relation to his property as might be reasonably required by the official receiver. The same answer, I think, applies. In a sense the act required of him had a relation to his property, but it was not I think an act of the class to which the sub-section applies. It may or may not be a right thing that a bankrupt should be compelled to aid his creditors in effecting an insurance on his life when there can be no reasonable objection on his part to a medical examination. That is a matter for the legislature to determine. However desirable the object to be attained may seem to be, the language of the present Bankruptcy Act ought not I think to be strained to bring within it cases which are not within the fair meaning of the words used" <sup>(2)</sup>.

If the order of discharge is granted, the bankrupt will be released from all provable debts except debts due on a recognition, or to the Crown, or to any person for any offence against the revenue, or to a sheriff or other public officer, on a bail bond (unless the Treasury certify their concurrence) and except debts incurred by fraud or fraudulent breach of trust to which the bankrupt was a party, or of which he obtained forbearance by

Effect of  
discharge.

<sup>(1)</sup> *The Board of Trade v. Block*,  
13 App. Cas. 570.

<sup>(2)</sup> *The Board of Trade v. Block*,  
13 App. Cas. 581.

any fraud to which he was a party<sup>(1)</sup>. An order of discharge will not release any person who is jointly liable with or a surety for the bankrupt<sup>(2)</sup>, and the bankrupt himself will, notwithstanding his discharge, be bound to assist his trustee in realizing and distributing his property<sup>(3)</sup>. A party to a contract made and to be performed in England is not discharged from his liability by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled<sup>(4)</sup>.

The Bankruptcy Discharge and Closure Act, 1887.

An Act was recently passed called the Bankruptcy Discharge and Closure Act, 1887 (50 & 51 Vict. c. 66), which has for its object the granting of discharges to debtors in the case of bankruptcies under Bankruptcy Acts prior to that of 1883, and the closing of all such bankruptcies and liquidations still remaining open<sup>(5)</sup>.

Where an undischarged bankrupt enters into transactions in respect of property acquired after the bankruptcy, with any person dealing with him *bond fide* and for value, whether with or without knowledge of the bankruptcy, then until the trustee intervenes all such transactions are valid against the trustee<sup>(6)</sup>.

Annulment of adjudication.

The Court has power to annul an adjudication in the following events: (1) Where in the opinion of the Court the debtor ought not to have been adjudged bankrupt at all; or, (2) where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full; or (3) where after an adjudication against the debtor a statutory majority of the creditors resolve to accept a composition, or assent to a general scheme of arrangement of the affairs of the bankrupt, and it is approved by the Court<sup>(7)</sup>. The Court has also a general discretionary

(1) Bankruptcy Act, 1883, s. 30, sub-ss. 1 and 2. Formerly a bankrupt was not released from any partnership debt incurred by the fraud of his partner, though himself innocent of the fraud: *Cooper v. Prichard*, 11 Q. B. D. 351; and see *Ramskill v. Edwards*, 31 Ch. D. 100.

(2) Bankruptcy Act, 1883, s. 30, sub-s. 4.

(3) Bankruptcy Act, 1890, s. 8, sub-s. 8. If he fails, he is guilty of contempt of Court, and also liable to have his discharge revoked.

(4) *Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux*, 25 Q. B. D. 399.

(5) 50 & 51 Vict. c. 66; and see *Ex parte Dunn*, *Re Brockelbank*, 58 L. J. Q. B. 375; 23 Q. B. D. 461.

(6) *Cohen v. Mitchell*, 25 Q. B. D. 262.

(7) Bankruptcy Act, 1883, sect. 23, sub-sect. 2; sects. 35, 104. *Ex parte Ashworth*, *Re Hoare*, L. R. 18 Eq. 705; *Re Stanger*, 22 Ch. D. 436, decided on the provisions of the Act of 1869. For the purposes of this part of the Act any debt disputed by a debtor is to be considered as paid in full, if the debtor enters into a bond in such sum, and with such securities as the Court approves, to pay the amount to be recovered in any proceedings with costs, and any debt due to a creditor who cannot be identified is to be considered as paid in full if paid into Court: Bankruptcy Act, 1883, s. 36.

There is also power to rescind a

power to annul a receiving order in any proper case, and that even though no scheme of arrangement or composition has been proposed by the debtor (*ante*, p. 908). It will consider all the circumstances of the case, the interests of the general body of the creditors and of the public, and the provisions of the Bankruptcy Act, 1883, as to the annulment of an adjudication <sup>(1)</sup>.

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receiving order and stay proceedings under sect. 14 of the Act, in a case where the bankruptcy proceedings ought to be taken in Scotland or in Ireland.

It has been decided that there is no power to annul a bankruptcy outside the provisions of the Bankruptcy Act: *Re Gyll*, 59 L. T. 778.

<sup>(1)</sup> *In re Hester*, 22 Q. B. D. 632.

## CHAPTER VII.

## JURISDICTION IN BANKRUPTCY.

We have now to consider what are the Courts having jurisdiction in bankruptcy.

Prior to the passing of the Bankruptcy Act, 1883, the London Bankruptcy Court was, as it was said, "outside the family of the law," and was a distinct Court.

Business  
assigned to  
Queen's  
Bench  
Division.

That Act, however, provided that on the 1st of January, 1884, the London Bankruptcy Court should be united and consolidated with and form part of the Supreme Court of Judicature, and that the jurisdiction of the London Bankruptcy Court should be transferred to the High Court. In accordance with further provisions contained in the Act, bankruptcy business has been, by order of the Lord Chancellor, assigned to the Queen's Bench Division, and to Mr. Justice Cave, as the judge under whose direction it is to be carried on <sup>(1)</sup>. The County Courts also have bankruptcy jurisdiction, unless excluded by the Lord Chancellor, who may attach the districts of the excluded Courts for the purpose of bankruptcy jurisdiction to any other County Court or Courts <sup>(2)</sup>.

The Court to which the petition should be presented will be the High Court, if the debtor has resided or carried on business within its district for the greater part of the six months previous to its presentation, or for a longer period during that time than in the district of any County Court, or is not resident in England, or if his address cannot be ascertained, but in any other case the proper Court will be the County Court in the district of which the debtor has resided or carried on business for the longest period during such six months <sup>(3)</sup>.

(<sup>1</sup>) Bankruptcy Act, 1883, sects. 93, 94. Orders of Lord Selborne, L.C., 1st January, 1884. The district of the High Court in bankruptcy matters includes, besides London, the districts of certain County Courts enumerated in the third schedule to the Act.

(<sup>2</sup>) Bankruptcy Act, 1883, sect. 92, sub-sects. 1 and 2. For the purposes of bankruptcy business the County

Courts have all the powers of the High Court (sect. 100), *e.g.* the power to commit for disobedience to a summons for examination: *R. v. Judge of County Court of Surrey*, 13 Q. B. D. 963. And see as to registrar of County Court, *Re Wise*, 17 Q. B. D. 389.

(<sup>3</sup>) Bankruptcy Act, 1883, s. 95. A proceeding is not invalidated because taken in the wrong Court. If a petition is inadvertently presented to the

The judges in bankruptcy are assisted in the performance of their judicial duties by registrars, whose powers are defined by sect. 99 of the Act, and by Rules and Orders <sup>(1)</sup>. Registrars.

The jurisdiction conferred on the Courts thus constituted is very extensive. Without liability to be restrained by any other Court every Court having bankruptcy jurisdiction may decide all questions of priorities, and all other questions of law or fact arising in any case of bankruptcy which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property <sup>(2)</sup>. Jurisdiction.

But wide as these powers are, it was held in numerous cases under the previous Act, that the Bankruptcy Courts would, as a matter of judicial discretion, decline to exercise jurisdiction in questions between the trustee and strangers to the bankruptcy where the trustee claimed by no higher title than the bankrupt had <sup>(3)</sup>, and in the case of County Courts where large amounts or questions of character were at stake <sup>(4)</sup>. This last limitation will, in the absence of special circumstances, hold

wrong Court, that Court can and will make a receiving order, though if the mistake is wilful the petition should be dismissed: *Ex parte May, Re Brightmore*, 14 Q. B. D. 37. The persons upon whom affidavits may be sworn are enumerated in sect. 135 of the Bankruptcy Act, 1883. It is further provided by sect. 24 of the Bankruptcy Act, 1890, that any affidavit to be used in a bankruptcy court may be sworn not only before the persons named in sect. 135 of the principal Act, but also in England and Wales before a justice of the peace for the county or place where it is sworn.

<sup>(1)</sup> See Bankruptcy Rules 7 and 8, and as to the High Court Registrars orders of Cave, J., of January 1st, 1884, and March 25th, 1885.

Registrars cannot: (1) commit for contempt; (2) hear appeals from the Board of Trade; (3) hear applications to set aside settlements or appeals against proofs over £200, or applications for trial of issues by jury and the trial of such issues. County Court Registrars, too, cannot hear applications for discharge, or to approve compositions or schemes when opposed, unless by the general or special directions of their respec-

tive judges. Registrars of the High Court also cannot: (1) hear applications by creditor or trustee for leave to commence actions; (2) decide on Board of Trade's objection to a trustee; (3) hear special cases; or, (4) applications to transfer actions or by the Board of Trade under sect. 102, sub-sect. 4 and 5; or, (5) applications as to settlement and trials of issues or actions; or, (6) applications under the Debtors Act, 1869, sect. 5 (orders of Cave, J., *ubi supra*, and of L. C., January 1, 1884, and March 4, 1885). Numbers 1 to 5 of these restrictions do not apply to County Courts; but no doubt the County Courts will be guided by them in their practice. In applications under the Debtors Act, 1869, s. 5, the powers conferred by that section can only be exercised by the judge or his deputy (see sub-sect. (e) of that section).

<sup>(2)</sup> Bankruptcy Act, 1883, s. 102, sub-sects. 1 and 2. See *Re Holt*, 58 L. J. Q. B. 5.

<sup>(3)</sup> *Ex parte Dickin, Re Pollard*, 8 Ch. D. 377; *Ex parte Musgrave, Re Wood*, 10 Ch. D. 94; *Ex parte Brown, Re Yates*, 11 Ch. D. 148.

<sup>(4)</sup> *Ex parte Armitage, Re Learoyd & Co.*, 17 Ch. D. 13; *Ex parte Price, Re Roberts*, 21 Ch. D. 553.

good now <sup>(1)</sup>; and the County Courts are further prevented from adjudicating upon any claim *not arising out of the bankruptcy* where the subject-matter in dispute exceeds £200, except by consent <sup>(2)</sup>. In the case of such bankruptcy business, however, as now comes within the cognisance of the High Court, there would seem no objection to such questions being determined by the bankruptcy judge.

Appeals.

Every Court of Bankruptcy has power to review, rescind, or vary any order made by it <sup>(3)</sup>, and appeals lie at the instance of any person aggrieved <sup>(4)</sup> from orders made by the High Court to the Court of Appeal, and, by leave, to the House of Lords <sup>(5)</sup>, and from orders made by a County Court to a Divisional Court of the High Court, and, by leave, to the Court of Appeal <sup>(6)</sup>.

Before leaving the subject of bankruptcy certain novel and special provisions remain to be noticed.

These are :—

(A.) The Court has power to order a summary administration, if it is satisfied by affidavit or otherwise, or the official receiver reports to the Court that the property of the debtor is not likely to exceed in value £300 ; and a variety of modifications are introduced with a view of saving expense and delay, the chief of which are that the official receiver shall be trustee, that there shall be no committee of inspection, and no appeal except by leave, and that when practicable the estate when realised shall be distributed in a single dividend <sup>(7)</sup>.

<sup>(1)</sup> *Re Beswick, Ex parte Hazlehurst*, 5 Mor. 105.

<sup>(2)</sup> Bankruptcy Act, 1883, s. 102, sub-s. 1.

<sup>(3)</sup> Bankruptcy Act, 1883, s. 104, sub-s. (1) : *Ex parte Ritso*, 22 Ch. D. 523; *Re Ayshford. Ex parte Lovering*, 4 Mor. 164; *Ex parte May*, 12 Q. B. D. 497; *Ex parte Leslie*, 18 Q. B. D. 619; *Re Maughan*, 21 Q. B. D. 21.

<sup>(4)</sup> "The words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A person aggrieved must be a man against whom a decision has been pronounced, which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." *Ex parte Sidebotham*, 14 Ch. D. 458; *Ex parte Official Receiver, Re Reed and Boren*,

19 Q. B. D. 174; *Re Ashwin*, 25 Q. B. D. 271.

<sup>(5)</sup> Bankruptcy Act, 1883, s. 104, sub-s. 2.

<sup>(6)</sup> The practice on appeals is regulated by Bankruptcy Rules 129–134 and by Rules of Supreme Court, O. LVIII.; see *Re Webber*, 24 Q. B. D. 313.

<sup>(7)</sup> Bankruptcy Act, 1883, s. 121, Bankruptcy Rules 273. The section concludes with a proviso that the creditors may at any time, by special resolution, resolve that some person other than the official receiver shall be appointed trustee in the bankruptcy, and thereupon the bankruptcy shall proceed as if an order for summary administration had not been made. An ordinary resolution must be passed by a majority in value of the creditors present, personally or by proxy, at a meeting of the



(B.) The next section confers upon a County Court the discretionary power to make an order providing for the administration of the estate of an insolvent debtor and for the payment of his debts by instalments or otherwise, but this power can only be exercised where judgment has been obtained in a County Court and the debtor is unable to pay the amount forthwith, and alleges that his whole indebtedness amounts to a sum not exceeding fifty pounds, inclusive of the debt for which the judgment is obtained <sup>(1)</sup>.

Small  
bankrupt-  
cies.

(C.) The Court has also a power in case of a deceased debtor where the debt would have been sufficient to support a bankruptcy petition against the debtor had he been alive, to make an order for the administration of the estate of the deceased according to the law of bankruptcy, and also to transfer proceedings for administration commenced in any other Court <sup>(2)</sup>.

Adminis-  
tration of  
deceased  
debtors'  
estates.

A contempt of Court is committed by a debtor : (a), if he disobeys an order of the Court enforcing a composition or scheme <sup>(3)</sup>; (b), if he fails in the performance of his duties as to discovery and realization of his property <sup>(4)</sup>; (c), if after discharge he fails to assist his trustee in realizing and distributing such of his property as is vested in the latter <sup>(5)</sup>. He is also liable to committal for disobedience to an order of the Board of Trade, as is also a trustee or other person, or an official receiver who disobeys a like order. It is also a contempt of Court if a person falsely states himself in writing to be a creditor with a view to inspect the debtor's statement of affairs, or does not hand over to the trustee any money and securities of the debtor which such person has no right to retain, or disobeys a subpoena <sup>(6)</sup>.

creditors, and voting on the resolution (s. 168). A special resolution must be carried by a majority in number, and three-fourths in value of the creditors present, personally or by proxy, at a meeting of creditors and voting on the resolution (s. 168).

(1) Bankruptcy Act, 1883, s. 122. Special Rules and Forms have been issued regulating practice under these administration orders.

(2) Bankruptcy Act, 1883, s. 125, Bankruptcy Rules 274-279, amended by sect. 21 of the Bankruptcy Act, 1890. Under an administration order the Court cannot summon witnesses for examination under sect. 27 (see *ante*, p. 915) : *Re Hewitt*, 15 Q. B. D. 159; nor, except by consent, order payment to the official receiver of

moneys received under a garnishee order : *Re Crowther, Ex parte Ellis*, 20 Q. B. D. 38; nor are voluntary settlements avoided by sect. 47 which has no application in such a case : *Ex parte Official Receiver, Re Gould*, 19 Q. B. D. 92. See also as to the effect of this section : *Re York*, 36 Ch. D. 233; *Re Fryman*, 38 Ch. D. 468; *Prout v. Gregory*, 24 Q. B. D. 281, *et seq.*

(3) Bankruptcy Act, 1890, s. 3, sub-s. 14.

(4) Bankruptcy Act, 1883, s. 24, sub-s. 4.

(5) Bankruptcy Act, 1890, s. 8, sub-s. 7.

(6) Bankruptcy Act, 1883, s. 102, sub-s. 5; s. 16, sub-s. 4; s. 50, sub-s. 6; Bankruptcy Rule 70.

## CHAPTER VIII.

## PUNISHMENT OF FRAUDULENT DEBTORS.

Imprison-  
ment for  
default in  
payment.

Closely connected with the subject of bankruptcy are the provisions of the Debtors Acts, 1869 and 1878 <sup>(1)</sup>. By sect. 4 of the former Act, arrest or imprisonment for default in payment of a sum of money is generally abolished, but is retained in the six following exceptional cases:—

1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract ;

2. Default in payment of any sum recoverable summarily before a justice or justices of the peace ;

3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control ;

4. Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order ;

5. Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any Court having jurisdiction in bankruptcy is authorized to make an order ;

6. Default in payment of sums in respect of the payment of which orders are in the Act authorized to be made.

The Debtors Act of 1869 has no application to the case of a debtor to the Crown, and accordingly, in a case where an appellant had entered into a recognizance for the payment of costs in the Court of Appeal, and the recognizance was subsequently estreated for non-payment, an order to discharge the prisoner was refused <sup>(2)</sup>.

Debtors  
Act, 1878.

The Debtors Act, 1878, confers upon the Court a discretionary power in the cases numbered 3 and 4 in sect. 4 of the Debtors Act, 1869, viz. in case of the specified default by a trustee or

<sup>(1)</sup> 32 & 33 Vict. c. 62; 41 & 42  
Vict. c. 54.

<sup>(2)</sup> *In re Arthur Heavens Smith*,  
2 Ex. Div. 47.

person acting in a fiduciary capacity, and in case of the specified defaults by a solicitor (see *ante*, p. 839), either to grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process or order of arrest or imprisonment, and any application to stay the operation of any such writ, process, or order, or for discharge from arrest or imprisonment thereunder.

Debtors  
Act, 1878.

Under this Act, "a very anxious and delicate discretion" is to be exercised by the Court.

The Act of 1869 is vindictive in the sense that it is intended for the punishment of fraudulent or dishonest debtors; but the Court ought to take into consideration the circumstances of each case, and the jurisdiction is only vindictive so far as it may be exercised to punish fraudulent misapplications<sup>(1)</sup>.

The same Act also gives power to commit to prison for a term not exceeding six weeks, or until payment, any person who makes default in paying any debt or instalment due from him in pursuance of any judgment or order of the Court. This power is, however, only exercisable by the judge or his deputy by order made in open Court and shewing on its face the ground on which it is issued, and then only on satisfactory proof that the debtor has, or has had since the date of the order or judgment, means to pay, and has refused or neglected, or refuses or neglects to pay. There is no jurisdiction to make an order that the debt be paid by instalments and that the debtor be committed to prison in default of payment of any of the instalments<sup>(2)</sup>.

It remains only to notice the provisions of the Debtors Act, 1869, and the Bankruptcy Act, 1883, with reference to the punishment of fraudulent debtors. Sects. 11 and 12 of the former Act create some seventeen offences in the case of bankrupts<sup>(3)</sup>,

Punish-  
ment of  
fraudulent  
debtors.

<sup>(1)</sup> Among the many decisions on these Acts we may refer specially to *Middleton v. Chichester*, L. R. 6 Ch. 156; *Evans v. Bear*, L. R. 10 Ch. 76; *Marris v. Ingram*, 13 Ch. D. 338; *Holroyde v. Garnett*, 20 Ch. D. 532; *Re M. A. Davies*, 21 Q. B. D. 236; *Re Strong*, 32 Ch. D. 342; *Re Wray*, 36 Ch. D. 138; *Litchfield v. Jones*, 36 Ch. D. 530; *Bates v. Bates*, 14 P. D. 17 (wife's costs in divorce suit); *Gent-Davis v. Harris*, 40 Ch. D. 190 (Privileges of Parliament); *Walker v. Walker*, 38 W. R. 766 ("possession or control").

<sup>(2)</sup> Debtors Act, 1869, s. 5: and see *Mitchell v. Simpson*, 25 Q. B. D. 183.

See as to the exercise of the powers conferred by this section; Bankruptcy Act, s. 105, Bankruptcy Rules 355-362; and see as to married women, *Draycott v. Harrison*, 17 Q. B. D. 147; *Scott v. Morley*, 20 Q. B. D. 120.

<sup>(3)</sup> These offences relate to: (1) failure to make full discovery of property; (2) failure to deliver up property; (3) failure to deliver up books and documents; (4) concealment of property or debts; (5) removal of property; (6) omissions in statement relating to debtor's affairs; (7) failure to inform trustee of false debts proved; (8) preventing production of books, &c.; (9) conceal-

and sect. 31 of the latter Act makes it a misdemeanour for an undischarged bankrupt to obtain credit to the extent of £20 or upwards without informing the person giving credit that he is undischarged.

The Court of Bankruptcy may order the prosecution of a debtor for any of these offences on the report of the official receiver or trustee, or on the representation of any creditor or member of the committee of inspection, if it appears to the Court there is reasonable probability of a conviction <sup>(1)</sup>; and the Court has also power to commit for trial <sup>(2)</sup>.

ment, mutilation, &c., of books, &c.; (10) false entries; (11) parting with, altering, &c., of books, &c.; (12) creating fictitious losses; (13) obtaining credit on false representations; (14) obtaining credit on false pretence of carrying on business; (15) pawning property obtained on credit; (16) obtaining consent of creditors by false representations; (17) absconding or attempting to abscond with property.

The 26th section of the Bankruptcy Act, 1890, provides that sect. 11 of the Debtors Act, 1869, shall have effect as if there were substituted therein for the words "if within four months next before the presentation of a bankruptcy petition against him" the words "if within four months next before the presentation of a bankruptcy petition *by or against him, or in case of a receiving order made under sect. 103*

of the Bankruptcy Act, 1883, before the date of the order."

Many of these offences were formerly confined to traders, but the Bankruptcy Act, 1883, s. 163, extends the provisions to all persons who have had a receiving order made against them, whether on their own or a creditor's petition. Numbers 13, 14 and 15 cannot, however, be committed by a person who presents his own petition: *Re Burden, Ex parte Wood*, 21 Q. B. D. 24. A creditor, too, who wilfully and with intent to defraud makes a false claim, is guilty of a misdemeanour by sect. 14 of the Debtors Act, 1869.

<sup>(1)</sup> Debtors Act, 1869, s. 16; Bankruptcy Act, s. 164. In such case the public prosecutor will act: s. 166. See also Debtors Act, ss. 17-20, and s. 23.

<sup>(2)</sup> Bankruptcy Act, 1883, s. 165.

## BOOK IX.

### PROBATE AND ADMINISTRATION.

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#### CHAPTER I.

##### JURISDICTION AND BUSINESS.

The Court of Probate (the jurisdiction of which, as shall be presently pointed out, has been since transferred to the Supreme Court of Judicature) was created by the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), and its jurisdiction was subsequently increased and amended by the Confirmation of Probate Act, 1858 (21 & 22 Vict. c. 56), and the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), and by the rules and orders which have been made from time to time.

Court of  
Probate.

By the 3rd section of the Court of Probate Act, 1857, "the voluntary and contentious jurisdiction and authority of all ecclesiastical, royal peculiar, peculiar, manorial, and other courts and persons in England at the passing of the Act having jurisdiction or authority to grant or revoke probate of wills or letters of administration of the effects of deceased persons," were abolished, and it was provided that no jurisdiction or authority in relation to any matters or causes testamentary, or to any matter arising out of or connected with the grant or revocation of probate or administration, should belong to or be exercised by any such court or person.

By the 4th section of the same Act, the voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons, together with full authority to hear and determine all questions relating to matters and causes testamentary, except suits for legacies and suits for the distribution of legacies, were transferred to the Queen, to "be exercised in the name of her Majesty, in a court to be called the Court of Probate."

A subsequent section constituted the Court of Probate a court of record.

By the Supreme Court of Judicature Act, 1873 <sup>(1)</sup>, the jurisdiction of the Court of Probate was transferred to the

Transfer  
of jurisdic-  
tion to  
Probate,

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<sup>(1)</sup> 36 & 37 Vict. c. 66, s. 3.

Divorce,  
and Ad-  
miralty  
Division.

Supreme Court of Judicature, and it was provided that the Division of the High Court to which such jurisdiction was transferred should be called the "Probate, Divorce, and Admiralty Division."

To that Division were assigned, along with the Divorce and Admiralty business (pp. 997, 1048 (subject to any rules of court or orders of transfer to be made under the authority of the Act)), all causes and matters pending in the Court of Probate, and all matters which would have been within the exclusive jurisdiction of that Court if the Judicature Act had not passed.

Judges.

The Act provided that there should be two judges of the Probate, Divorce, and Admiralty Division, namely the existing judge of the Court for Divorce and Matrimonial Causes who was to be the President of the Division, and the existing judge of the High Court of Admiralty, unless either of them was appointed an ordinary judge of the Court of Appeal. The judge of the Admiralty and the judge of the Probate Court may sit for each other <sup>(1)</sup>.

Disposal of  
business.

The Judicature Act, 1873, provides that subject to any rules of Court all business arising out of any cause or matter assigned to the Probate, Divorce, and Admiralty Division is to be transacted and disposed of in the first instance by one judge only. Divisional Courts may be held for the transaction of any part of the business assigned to this Division, which the judges of the Division, with the concurrence of the President of the High Court, may deem proper to be heard by a Divisional Court. Any cause or matter assigned to this Division may, at the request of the President of the Division, with the concurrence of the President of the High Court, be heard by any other judge of the High Court <sup>(2)</sup>.

Officers.

The officers of the Probate Division consist of four registrars, two record keepers, and one sealer for the principal registry of the Court of Probate, one district registrar for each district registry: besides clerks and other subordinate officials <sup>(3)</sup>.

Attention must be directed to an extremely important saving clause with regard to the practice of the Court of Probate.

Rules and  
Orders.

Sect. 18 of the Judicature Act, 1875, provided that all rules and orders of court in force at the time of the commencement of the Act in the Court of Probate, except so far as varied by the first schedule to the Act, or by rules of court, made by Order in Council before the commencement of the Act, shall remain in

(1) 21 & 22 Vict. c. 95, s. 1.

(2) 36 & 37 Vict. c. 66, ss. 42, 44.

(3) 20 & 21 Vict. c. 77, s. 14; 21

& 22 Vict. c. 58, ss. 6, 24. All these officers were reappointed by sect. 77 of the Judicature Act, 1873.

force until altered or annulled by any rules of Court made after the commencement of the Act <sup>(1)</sup>. The same section also enacts that the President for the time being of the Probate and Divorce Division of the High Court of Justice shall have power to make rules with regard to non-contentious or common form business in the Probate Court.

It has already been pointed out (*ante*, p. 7), that real estate passes on the death of the testator or intestate, direct to the devisee or heir. The law with regard to personal property is completely different.

There is no legal succession in England of the persons who are beneficially entitled to the personal estate of the deceased. Before 1858, the right of succession (in the case of a total intestacy) vested in the ecclesiastical ordinary, but now by the Probate Act, 1858 <sup>(2)</sup>, the estates of all deceased persons (whether testate or intestate) are vested in the judge of the Probate Court, who delegates succession to some person or persons interested in such estates.

Succession  
to personal  
property

To executors probate is granted, and, if there be no executor, a grant of letters of administration with the will annexed is made to some person or persons interested in the estate.

Probate  
and ad-  
ministra-  
tion.

If there is an absolute intestacy, letters of administration are granted to some person or persons who has or have a legal interest in the estate.

The General Rules and Orders for the Registrars of the Principal Registry, 1862, provide that no probate or letters of administration, *with the will annexed*, shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the judge or by order of two of the registrars of the principal registry. They further provide that no letters of administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the judge or by order of two of the registrar of the principal registry <sup>(3)</sup>.

A further rule provides that "in every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit" <sup>(4)</sup>.

<sup>(1)</sup> 38 & 39 Vict. c. 77, s. 18.

<sup>(2)</sup> 21 & 22 Vict. c. 95, s. 19.

<sup>(3)</sup> 43 & 44 P. R.; 51 & 52 D. R.

In the case of a district registry the

order can be made by one registrar of the principal registry.

<sup>(4)</sup> 45 P. R.

The office of probate is twofold <sup>(1)</sup>, as besides "granting administration, it authenticates the will, and is evidence of the character of the executor."

Grant of  
probate.

Solemn  
form,  
common  
form.

*Probate* is granted either in *solemn form* or *common form*. Probate in solemn form is generally obtained in extraordinary and disputed cases. Solemn decrees of the Court are made which are, except in special cases (as, for instance, fraud or collusion), conclusive on all persons who are parties to the proceedings or cognizant of them.

The jurisdiction of the Probate Division is divided into two heads, viz., common form business and contentious business.

Common  
form  
business.

Common form business is defined by the 2nd section of the Probate Act, 1857 <sup>(2)</sup>, as the business of obtaining probate and administration, where there is no contention as to the right thereto, including the passing of probates and administrations through the Court of Probate in contentious cases, when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration.

The provisions of the Judicature Act enlarging the powers of the Court have no effect whatever upon the non-contentious branch of the jurisdiction of this Court, and no question of the enlargement of the jurisdiction existing in the Court can arise in the non-contentious business <sup>(3)</sup>.

The subject-matter of common form business in the Probate Division is personalty left in England or in transit to this country by any person, native or foreign, at the time of his or her death <sup>(4)</sup>.

In a case where the party in respect of whose estate a grant was asked, died abroad, the Court required an affidavit that he left personal property in England. The principle on which the Court proceeded was that "unless the deceased left some property in this country, there was nothing upon which the grant asked for would operate, and consequently no jurisdiction to decree letters of administration."

Ship.

It is provided by 27 & 28 Vict. c. 56, s. 4, that a ship, or share

<sup>(1)</sup> *Matson v. Swift*, 14 L. J. R. Chanc. p. 354.

<sup>(2)</sup> 20 & 21 Vict. c. 77, see as to grants by district registrars, *post*, p. 995.

<sup>(3)</sup> *In the Goods of Elizabeth Tom-*

*linson*, 6 P. D. 209.

<sup>(4)</sup> *Evans v. Burrell*, 4 Swabey & Tristram, p. 186. See *In the Goods of Coode*, L. R. 1 P. & D. 449; Williams on Executors, 8th ed. p. 436.



of a ship registered at a port in the United Kingdom, is to be taken as part of such personalty, notwithstanding such ship at the time of the death of the deceased, may have been at sea, or elsewhere out of the United Kingdom.

The law on the subject with which we have now to deal falls naturally under the two great heads under which it shall be subsequently considered, viz., probate of wills and matters appertaining thereto and grants of letters of administration. It will be however desirable here to notice certain points which have a common bearing on both branches of the subject.

Grants of probate and administration.

Grants, of probate and of administration are: 1. Original; 2. Supplementary; 3. Accumulated.

1. Original grants are those first applied for.

2. Supplementary grants, or grants of administration *de bonis non*, i.e., *de bonis non administratis* of the effects of the deceased not yet administered are grants to carry on the administration of an estate already partially administered.

Such a grant is made when an executor or an administrator, with or without the will annexed, has left part of the estate unadministered.

3. Accumulated grants are necessary to administer property in more than one of the various divisions of the United Kingdom<sup>(1)</sup>.

Original grants of probate or administration are either General, Limited, or Special.

General grants are those which embrace all the personal effects of the deceased.

Limited grants.

Grants may be limited either (1) in respect of estate, as where only a part of the estate has been administered and a grant *de bonis non administratis*, "*de bonis non*," as it is shortly termed, is granted, or (2) in respect of time when the grant is during minority (*durante minoritate*) or during absence (*durante absentia*), during the progress of litigation *pendente lite*, or (3) limited to a particular purpose—as the grant *ad colligenda bona* <sup>(2)</sup>—for the preservation of perishable property or under Lord Campbell's Act (*ante*, p. 497).

In a case decided in 1880, the late Sir George Jessel, disregarding an argument which was in his opinion founded upon some obscure *dicta* in some musty old law books about the power of an administrator *durante minore ætate*, held that an

<sup>(1)</sup> Rule 74, P. R.

<sup>(2)</sup> *In the Goods of Anne Ashley*, 15 P. D. 120; see also as to limited

administration: *In the Goods of Crawford*, 15 P. D. 212.

administrator *durante minore ætate* has, for the time, all the powers of an ordinary administrator, including a power to sell the estate of the deceased for payment of debts <sup>(1)</sup>.

In a recent case administration was granted to the assignee in bankruptcy of an administrator out of the jurisdiction limited to the fund to which the assignee was entitled. A grant is limited as to purpose when it is made for a particular object, *e.g.* to bring an action under Lord Campbell's Act (*ante*, p. 497 <sup>(2)</sup>).

No person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant except under the direction of the judge <sup>(3)</sup>.

A grant, whether original, accumulated, or supplemental, relates back to the date of the decease of the testator or intestate.

All second and subsequent grants of probate or letters of administration are to be made in the principal registry, or in the district registry where the original will is registered, or the original grant of letters of administration has been made, or in the district registry to which the original will, or a registered copy, or the record of the original grant of administration have been transmitted <sup>(4)</sup>.

<sup>(1)</sup> *Re Cope. Cope v. Cope*, 16 Ch. D. 49, 52.

<sup>(2)</sup> *In the Goods of Hammond*, 6 P. D. 104.

<sup>(3)</sup> 30 P. R.; 36 D. R.

<sup>(4)</sup> 21 & 22 Vict. c. 95, s. 20. The various forms in which grants are usually made are exhibited by Mr. Dixon in a table which may be summarized as follows:—*Durante minore ætate*; *Durante absentia*; *De bonis non* (see above in text); *Cæterorum* (to administer a portion of the estate

to which no previous grant has extended); *Ad colligenda bona* (see in text); *Ad litem*; *Pendente lite*; *Cessate* grant, viz., "a permanent grant of the whole of the deceased's estate as contemplated in an original *temporary* grant limited as to time in a given contingency;" Dixon's Probate Manual, 71; and see Browne on Probate, 199, *et seq.*; and see as to grant in the case of a pauper lunatic, *In the Goods of Eccles*, 15 P. D. 1.

Relation  
of grant.

Second  
and sub-  
sequent  
grants.

## CHAPTER II.

## WILLS.

*Who may make a Will.*

In another portion of this work we considered the subject of wills with special reference to the law of property. Our present task is to consider wills with special reference to the business of the Probate Division.

The attention of the reader has already <sup>(1)</sup> been directed to the fact that although it would seem that any judge of the High Court has jurisdiction to grant probate or administration, yet that practically the jurisdiction is vested in the Probate, Divorce and Admiralty Division, as being the particular branch of the Court that is appointed for the purpose of granting administration and probate of wills <sup>(2)</sup>. Jurisdiction.

True it is that the executor's right is derived from the will and not from the probate, and probate has been judicially characterized as "a mere ceremony," "evidence of the executor's right." But it must be borne in mind that it is an indispensable ceremony: "I consider that in all branches of the Court the only evidence of a will of personal estate is the probate, and that before you can ask the Court to look at the will and to grant any relief upon it you must prove it" <sup>(3)</sup>.

The essentials to the validity of a will are:—

(1) That the testator be of full age (for by the Wills Act a minor's will is invalid <sup>(4)</sup>), and of sufficient testamentary capacity. Essentials of a will.

(2) The will must be made and executed in accordance with the provisions of the Wills Act (*ante*, p. 158, *et seq.*).

(3) There must be no fraud or undue influence on the part of the person who applies for the probate.

There must not be lack of discretion nor lack of free will <sup>(5)</sup>.

What is the legal test of sufficient "testamentary capacity?" Testamentary capacity.

<sup>(1)</sup> *Ante*, p. 356.

<sup>(2)</sup> Per James, L.J., *Dowdeswell v. Dowdeswell*, 9 Ch. D. 294, 301, and see *Priestman v. Thomas*, 9 P. D. 210. See note *ante*, p. 356.

<sup>(3)</sup> Per Jessel, M.R., in *Pinney v. Hunt*, 6 Ch. D. 98.

<sup>(4)</sup> 1 Vict. c. 26, s. 7.

<sup>(5)</sup> Dixon, Probate, p. 6.

Testamen-  
tary  
capacity.

The law on this subject is that the fact that a man is capable of transacting business, whatever its extent, or however complicated it may be, and however considerable the powers of intellect it may require, does not exclude the idea of his being of unsound mind.

A man, the President said, might be a good carpenter, and yet be tainted with insanity to such an extent as to render him irresponsible for a crime, on the ground that he did not know the nature of the act; and similarly the fact that a man possessed capacity to deal with complex subjects, to write pamphlets, and to make calculations, had nothing whatever to do with the question whether or no he was of unsound mind with reference to making his will. On the other hand, it must be borne in mind that, if the delusions could not reasonably be conceived to have had anything to do with the deceased's power of considering the claims of his relations upon him and the manner in which he should dispose of his property, then the presence of a particular delusion would not incapacitate him from making a will.

The extremely delicate and difficult investigation which was requisite to determine whether a testator possessed testamentary capacity might, the Court said, be illustrated by reference to the physical world. There might be a little crack in some geological stratum of no importance in itself, and nothing more than a chink through which water filters into the earth; but it might be shown that this flaw had a direct influence upon the volume or colour, or chemical qualities of a stream that issued from the earth many miles away. So with the mind. Upon the surface all may be perfectly clear, and a man may be able to transact ordinary business or follow his professional calling, and yet there may be some idea through which in the recesses of his mind an influence is produced on his conduct in other matters. The jury have to say whether or not the flaw or crack in the testator's mind was of such a character that, though its effect may not be seen on the surface of the document before you, it had an effect upon him when dealing with the disposition of his property (1).

Burden of  
proof.

The burden of proof, however, it must not be forgotten, rests upon those who propound the will, and, *à fortiori*, this principle applies when it appears that the testator was subject to delusions.

Execution  
of will.

The second essential of the validity of a will, viz., its execution according to the formalities prescribed by the Wills Act, has already to some extent been considered (*ante*, p. 158, *et seq.*), and

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(1) *Smee v. Smee*, 5 P. D. 84.

shall be considered hereafter (*post*, p. 965), but the third essential of the *animus testandi* may now be noticed. "To make a good will," as was said in a leading case, "a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like—these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure, of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition, without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, not driven, and his will must be the offspring of his own volition, and not the record of some one else's" <sup>(1)</sup>.

*Animus testandi.*

Undue influence.

A person deaf and dumb from nativity is, in presumption of law, an idiot, and therefore incapable of making a will; the presumption may, however, be rebutted, and if it sufficiently appears that such person understands what a testament means, and has a desire to make one, he or she may by signs and tokens declare his or her testament. If a person who is not deaf and dumb by nature, but being once able to hear and speak, by some accident loses both hearing and speech but is able to write, such person may make with his or her own hand his or her will or testamentary document.

Deaf and dumb persons.

A blind or illiterate person is capable of making a will, but before such will is admitted to probate, or administration with the will annexed is granted, proof must be given to the registrar that the will was read over to the testator before its execution, or that the testator had at such time knowledge of its contents.

Blind or illiterate persons.

In a case decided in 1885 <sup>(2)</sup> the President stated that from his long experience in Court he found that there was no subject upon which there was a greater misapprehension than that of "undue influence," and he accordingly carefully expounded the law with regard to that important subject. After pointing out that one person might have an evil influence over the other and might encourage him in evil courses, and thus obtain a will in

Undue influence.

(1) *Hall v. Hall*, 1 P. & D. 482; and see *Boyse v. Rossborough*, 6 H. L. 34.

(2) *Wingrove v. Wingrove and Others*, L. R. 11 P. D. 81.

Undue  
influence.

her or his favour, and that that, shocking as it might be, would not amount to "undue influence," his Lordship proceeded as follows: "To be undue influence in the eye of the law there must be—to sum up in a word—coercion. It must not be a case in which a person has been induced by means such as I have suggested to you, to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence. The coercion may, of course, be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain that the sick person may be induced for quietness' sake to do anything. This would equally be coercion, though not actual violence. These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of some one else offering them, do not amount to undue influence, unless the testator is in such a condition that, if he could speak his wishes to the last, he would say, "This is not my wish, but I must do it." If, therefore, the act is shown to be the result of the wish and will of the testator at the time, then, however it has been brought about—for we are not dealing with a case of fraud—though you may condemn the testator for having such a wish, though you may condemn any person who has endeavoured to persuade, and has succeeded in persuading the testator to adopt that view—still it is not undue influence. There remains another general observation that I must make, and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the will, such as it is, has been produced "

## CHAPTER III.

WILLS—*continued.*

Let us now proceed to consider the law with regard to (1) the execution of wills; (2) the incorporation of documents; (3) interlineations, alterations, &c., in wills; (4) the revocation of wills.

1. *The Execution of Wills.*

The law with regard to the execution of a will, which has been already to some extent considered (*ante*, p. 158, *et seq.*), is well illustrated by several cases which have recently come before the Court. Execution of wills.

In a case which came before the President in 1886 <sup>(1)</sup>. The facts were as follows:—A testator, two days before his death, being paralysed on one side, and partly speechless, intimated to the two medical men in attendance on him his desire to make a will. They interpreted his wishes by signs, and wrote them down on a card. He executed the document by making his mark, which however appeared in the middle of the writing, and they then put their initials as witnesses at the back. The document which was propounded to the Court as a testamentary document was in the words and form following:— *Margary v. Robinson.*

“£30,000

“To Miss Robinson

to be tied up to

her for life and Mr. Leyard's Mark.

after her to come

back to my family

and divided

fairly and equally.”

It was written on a card on the reverse side of which the attesting witnesses had put their initials thus:—

“Witnesses to Mark

P. E.

J. S.

Nov 20. 1885.”

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(1) *Margary v. Robinson*, 12 P. D. 8.

*Margary v.  
Robinson.*

Subsequently, after a conversation with one of the testator's relatives, they returned to his room, and telling him that they had taken on themselves more responsibility than they ought to have taken, and that what they had written must be regarded as a memorandum, they erased their initials at the back. The testator seemed to acquiesce in this, but the card was found after his death in a hand-bag which he kept near his bed, and there was evidence that he had shown it to the lady whom he intended to benefit, telling her it was for her, and that he wished her to take it.

The Court decided that the card constituted a valid testamentary paper duly witnessed, expressing the intentions of the deceased, and that what passed at the erasure of the witnesses' initials did not amount to a revocation; but that as the card was not signed at the "foot or end" within the meaning of the statute, and was therefore not duly executed, it was not entitled to probate.

The President, in delivering judgment, cited with approval the following observations of Lord Penzance in a former case <sup>(1)</sup>:—"The Court would not be justified in fixing upon a signature in the midst of what the testator intended as his will and treating it as an execution of all that preceded and granting probate of so much of the will to the disregard of the remainder. This in many cases might produce a testamentary result far from the testator's wishes. It does not become the Court in a laudable anxiety to give effect to the document to twist or distort the plain meaning of the statute by ingenious construction and virtually break the law to mend the testator's blunder."

Execution  
of codicil.

A testator duly executed a will prepared by a solicitor which was written on the first side of a sheet of foolscap paper. Shortly before his death he desired to make an alteration in the disposition of his property, and he accordingly called in the assistance of a neighbour, not of the legal profession, who wrote out a codicil on the third sheet of the foolscap, beginning: "The following alterations having been first made," and ending with an attestation clause in due form. The mark of the testator, and the signatures of the attesting witnesses, were written opposite the body of the will on the margin of the first page, the person who prepared the codicil being under the impression that as it was an alteration in the will it ought to be attested on the margin. The Court decided that the codicil was not duly executed, and probate was refused.

(1) *Sweetland v. Sweetland*, 4 Sw. & Tr. 6.



The President in delivering judgment said :—

“It is sufficient to say that the Legislature has never departed from this standard, that the execution of a testamentary paper must be signed at the foot or end thereof. All it has done has been to extend these words in some particulars. But it appears to me to be impossible to say that this execution on the first page is an execution at the foot or end of the document which is on the third page. It is an illustration of the saying about the danger of “a little knowledge.” The parties seem to have thought that, because alterations are directed to be indicated in the margin of a will, that the codicil, which effects an alteration in the meaning of the will, may be treated as an alteration in the will itself, and is to be executed in the margin of the will. That is an entirely mistaken view, and I am compelled, therefore, to hold that this codicil cannot stand, and I refuse probate” (1).

To constitute a sufficient acknowledgment of the signature, the witnesses must, at the time of the acknowledgment, see, or have the opportunity of seeing, the signature of the testator. If this be not the case, it is immaterial whether the signature be, in fact, there at the time of attestation, or whether the testator say that the paper to be attested is his will, or that his signature is inside the paper; and accordingly in a case (2) involving a large amount of property, where the Court was satisfied on the evidence that neither of the witnesses could see the signature of the testatrix, there being a piece of blotting-paper covering about one-third of the sheet on which they wrote terminating at the lowest crease, which brought it down to close above the signature of the first attesting witness, it was held that the will was not properly executed.

Acknowledgment of signature.

In this case Sir George Jessel cited with approval the following statement by Dr. Lushington, of the law with regard to “what is acknowledging a signature in the presence of witnesses.”

“What do the words import but this? Here is my name written; I acknowledge that name so written to have been written by me; bear witness.” How is it possible that the witnesses should swear that any signature was acknowledged unless they saw it? They might swear that the testator said he acknowledged a signature, but they could not depose to the fact that there was an existing signature to be acknowledged. It is quite true that acknowledgment may be expressed in any

(1) *In the Goods of Benjamin Hughes*, L. R. 12 P. D. 107.

7 P. D. 102. See as to signature of legatee under alteration clause, *In the Goods of E. J. Smith*, 15 P. D. 2.

(2) *In the Goods of Mary Gunstan*,

Acknowledgment of signature.

words which will adequately convey that idea, if the signature be proved to have been then existent; no particular form of expression is required either by the word "acknowledge" or by the exigency of the act to be done. It would be quite sufficient to say "that is my will," the signature being there and seen at the time; for such words do import an owning thereof; indeed it may be done by any other words which naturally include within their true meaning acknowledgment and approbation.

And, with reference to the particular case before them, another of the judges of the Court of Appeal, added :—

"One must feel distressed at the result that the disposition of her property which this lady intended to make must depend upon the accident of putting a piece of blotting-paper a quarter of an inch higher or lower. . . . But we have to consider here an enactment of a statute, in which there is no elasticity, we are bound to say whether this particular will complied with the requirements of the statute."

In a case which was decided in 1889 a testator had duly executed his will, which consisted of five sheets, each of which was signed by him and initialed by the attesting witnesses. He subsequently took out three sheets and substituted three new ones in his own handwriting, signed but not attested. He did not alter the date of his original will nor re-sign it, nor was it re-attested. The Court decided that the will was not entitled to probate <sup>(1)</sup>.

#### WILLS OF SOLDIERS AND SAILORS.

Wills of soldiers and sailors.

The Wills Act (sect. 11), provides that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the Act. The effect of this, as Mr. Browne tells us, is that, subject to the statute first mentioned in the note, almost any document clearly testamentary, however executed, emanating from a soldier in actual military service, or seaman at sea, is entitled to probate <sup>(2)</sup>.

#### 2. Incorporation of Documents.

Incorporation of documents.

In a former portion of this work (*ante*, p. 166), allusion has been made to the subject of "incorporation."

<sup>(1)</sup> *Treloar v. Lean*, 14 P. D. 49; and see *In the Goods of Colyer*, 14 P. D. 48, where probate was granted by consent.

<sup>(2)</sup> Browne on Probate, p. 79, and see, as to the construction of this

Act, Williams on Executors, 8th ed. vol. i. p. 118; see also the Navy and Marine Wills Act (28 & 29 Vict. c. 72), and, as to preferential payment of regimental debts, 26 & 27 Vict. c. 57.

The subject was there considered with reference to the *construction* of the will. It has now to be considered with reference to the question of what does the will consist.

Incorporation, says Mr. Dixon <sup>(1)</sup>, though akin to attestation, from the fact that testamentary papers, sought to be incorporated in the probate, are, at times, found to have been unattested, is yet more nearly akin to revocation. For it will be seen that, where two testamentary papers are in existence, it must be settled before probate is granted whether the later incorporates or revokes the earlier. A will may be good by reference to some other paper, no matter what. When the thing referred to is ascertained, it is as much a part of the will as if it were within the sheets. Reference to a paper, not executed according to the statute, makes it part of the will of a testator if it is identified beyond all doubt.

Incorporation.

A will, it may thus be seen, can be contained in several documents. "The will of a man" said Lord Penzance, "is the aggregate of his testamentary intentions, so far as they are manifested in writing duly executed according to the statute; and as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers each so executed. Redundancy or repetition in such independent papers will no more vitiate any of them, than similar defects if appearing on the face of a single document" <sup>(2)</sup>.

A will may be contained in several documents.

And where a testator left two wills—one limited to property in England, and the other to property in Tasmania, and appointed different executors to each will, the Court granted probate of both documents as together containing the last will of the deceased <sup>(3)</sup>.

And where the testator left two testamentary papers, and the bequests in the second were inconsistent with those in the first, and the second paper did not contain any appointment of executors, but neither did it revoke the appointment of executors contained in the first paper, here again the Court treated both documents as together containing the last will of the deceased, and admitted them to probate <sup>(4)</sup>.

But where two testamentary papers, similar in substance but differing in language (one being clearly an amended copy of

<sup>(1)</sup> Dixon's Probate, 84.

<sup>(2)</sup> *Lemage v. Goodban*, L. R. 1 P. & D. at p. 62.

<sup>(3)</sup> *In the Goods of Harris*, L. R. 2 P. & D. 83. See as to probate being granted of English will alone, where testator had left both an

English and a foreign will: *In the Goods of Cullaway*, 15 P. D. 147; *In the Goods of A. C. Granet De la Rue*, 15 P. D. 185.

<sup>(4)</sup> *In the Goods of Petchell*, L. R. 3 P. & D. 153.

Incorporation.

the other), were executed on the same day, the Court, in the absence of extraneous evidence as to which of them was executed first, acted on the internal evidence afforded by the papers themselves, and granted probate only of the one which appeared to be an amended copy of the other <sup>(1)</sup>.

It often happens that documents, or portions of documents, referred to in a testamentary paper become incorporated with, and form part of, such testamentary paper, and as such obtain the probate of the Court <sup>(2)</sup>.

If a will contain a reference to any document (in existence at the time when the will was executed), of such a nature as to raise a question whether it ought to form a constituent part of the will, the production of the document is required, with a view to ascertain whether it be entitled to probate; if not produced, its non-production must be accounted for.

Where a testator made his will in India, and deposited it with a bank at Calcutta, but while temporarily resident in Scotland executed a codicil in which he referred in distinct terms to a copy of the will and produced this copy to the witnesses at the time he executed the codicil, and deposited both papers in the hands of his executor, it was held that the copy was incorporated by the codicil, and probate of the copy, will, and codicil was granted without the production of the original will <sup>(3)</sup>.

Incorporation of list of articles.

In another case Lady Truro by her will dated the 15th of September, 1865, gave to the "present Baron Truro" among other bequests "all such articles of silver plate and plated articles as are contained in the inventory signed by me and deposited herewith." The will was deposited at Lady Truro's bankers in an envelope, and in the same envelope with the will was found an inner envelope containing a list in several sheets headed, "List of plate and plated articles left by my will dated the 15th of September, 1865, to the present Baron Truro. Augusta E. Truro." The list was signed in several places, and on the last sheet was the testatrix's signature, and the date, 21st of September, 1865. There was evidence that the will and the list were deposited with the bankers on the 21st of September, 1865. There was also evidence that when the will was executed the attention of the testatrix was called to the importance of signing the inventory and depositing it with her will, and that

<sup>(1)</sup> *In the Goods of Stephens*, 22 L. J. (P. & M.) 727; 18 W. R. 528.

<sup>(2)</sup> The rules relating to the Incorporation of Documents are the same whether a will is dated before

or after the 31st of December, 1837, when the Wills Act (7 Wm. 4, and 1 Vict. c. 26) came into operation.

<sup>(3)</sup> *In the Goods of Mercer*, L. R. 2 P. & D. 91.

she intimated her intention of acting upon that suggestion. Lady Truro subsequently executed a codicil, which described itself as a codicil to the will, but did not confirm it. It was held that the will must be read as if it had been executed at the time of the execution of the codicil, and that the list referred to was to be taken as incorporated therewith, and to be admitted to probate <sup>(1)</sup>. The list of articles must, however, be clearly identified with that mentioned in the will, otherwise the Court will reject it <sup>(2)</sup>.

Incorporation.

In a case decided by the House of Lords in 1878, the will contained the following words: "I direct my executors to pay the expenses of my funeral, and all my lawful debts out of the proceeds of my property," and continued thus: "Whereas I am possessed of landed and chattel property, as stated in the annexed schedule." The will was written on three sides of a sheet of paper with the signature and attestation at the bottom of the third side, but the schedule was on the fourth side in the handwriting of, and signed by, the testator, and dated the same day as the will. The witnesses who attested the will had not seen the schedule when they made their attestation. The Court held that, as the schedule was not proved to have been written at the time of the execution of the will, it could neither be incorporated with the will, nor referred to for the purpose of assisting in its construction <sup>(3)</sup>.

A testator, after executing his will, gave his brother a list, signed only by himself, of certain donations, which he requested him to pay out of his estate, after his death. He subsequently executed a codicil to his will, in which he referred to one of these donations, "which I name in the legacies which I gave you, and increased its amount."

The President, though he considered that the reference in the codicil to the then existing list was awkwardly made, was of opinion that it sufficiently expressed the testator's meaning, and he accordingly decided that the list might be incorporated in the probate <sup>(4)</sup>.

No particular form of words is necessary for incorporation. Thus, when a testator executed "another codicil" to his will,

<sup>(1)</sup> *In the Goods of Lady Truro*, L. R. 1 P. & D. 201.

<sup>(2)</sup> *In the Goods of Greaves*, 28 L. J. (P. & M.) 18.

<sup>(3)</sup> *Singleton v. Tomlinson*, 3 App. Cas. 404; see also *In the Goods of Warner*, 10 W. R. 566; *Watson v. Arundel*, 10 Ir. R. E. 299.

<sup>(4)</sup> *In the Goods of James Daniell*,

*deceased*, 8 P. D. 14. In a case where an intended will was written in duplicate, and one copy was signed only by the deceased, and the other only by the attesting witnesses, it was decided that neither document was entitled to probate: *In the Goods of J. Hatton*, 6 P. D. 204.

Incorporation.

this was held to incorporate an unattested paper, which was the only other one to which he could refer.

The law with regard to incorporation was considered in a case which came before the Court in 1884 <sup>(1)</sup>.

A testatrix duly executed her will, and (*inter alia*) bequeathed to trustees named in the will all her watches, jewellery, and other personal effects, "upon trust to deliver the same, as soon as conveniently may be after my decease, to such my children and issue as I shall, by any memorandum in writing, purporting to dispose thereof, and signed by me, direct." She subsequently drew up a memorandum, putting the name of the beneficiary against each article, but she did not sign the document. About two months later she made a codicil, by which she confirmed her will, except in so far as it was altered by this codicil. The registrar refused to admit the memorandum to probate.

Butt, J., in delivering judgment, said: "I do not want authority to show that if this document had been duly signed it would be incorporated in the will. The very reason why she did not sign it may have been that she did not wish it to be incorporated. If the memorandum is not in conformity with the terms of the will, how can it be incorporated by the subsequent execution of the codicil?"

"The codicil contains these words: 'In all other respects, I confirm my said will.' That means, amongst other things, in so far as it refers to that memorandum. Why am I to assume that this lady did not prepare this memorandum merely as a draft, that she hesitated to make it part of her will, and on that account refrained from signing it? Under these circumstances, I hold that the registrars were right in refusing to allow this memorandum to be incorporated in the probate of the will and codicil."

In a case <sup>(2)</sup> decided in 1890, a testatrix had, by a settlement made in contemplation of her marriage, settled her property upon such trusts as she should by revocable deed or will appoint. She subsequently made a will which did not expressly include the property in question, and some years afterwards she executed two revocable deeds poll duly attested by two witnesses, by which she appointed the settled property upon trusts to take effect from and after her decease. The Court decided that the deeds were testamentary instruments

<sup>(1)</sup> *In the Goods of MacGregor*, 60 L. T. (N.S.) 840.

<sup>(2)</sup> *Milnes v. Foden*, 15 P. D. 105, 107.

entitled to probate along with the will as constituting the last will of the deceased. "The true principle," said the President, "to be deduced from the authorities as stated in Williams on Executors, appears to be that if there is proof either in the paper itself or from clear evidence *dehors*, first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a will; secondly, that death was the event that was to give effect to it, then whatever may be its true form it may be admitted to probate as testamentary. It is not necessary that the testator should intend to perform or be aware that he has performed a testamentary act. In my opinion both the deeds poll fulfil the essential conditions just mentioned, and are together with the will of 1884 entitled to probate."

When a testatrix, after duly executing a will, subsequently executed a paper drawn up by her husband with her full concurrence, headed "This is not meant as a legal will but as guide," the Court held that the paper was not a valid testamentary document, and that it ought not to be admitted to probate <sup>(1)</sup>.

The republication of the will which is involved in the execution of a codicil may have the effect of adding something to the will which formed no part of it when executed, and which is not to be found in the codicil itself. Thus, in one case, it was decided that a codicil gave effect to alterations made in a will after the execution <sup>(2)</sup>.

Republica-  
tion of  
will.

The general rule as to the consequences of the republication of a will is thus laid down in Williams on Executors <sup>(3)</sup>: "It has long been settled law that the republication of a will is tantamount to the making of that will *de novo*; it brings down the will to the date of the republishing, and makes it speak as it were at that time. In short the will so republished is a new will.

### 3. *Interlineations and Alterations.*

The law as to interlineations, alterations, erasures, and obliterations which appear in wills dated before 1st of January, 1838, when the Wills Act came into operation, is widely different from that applying to wills made since that date <sup>(4)</sup>.

Interlinea-  
tions and  
altera-  
tions.

<sup>(1)</sup> *Ferguson-Davie v. Ferguson-Davie*, 15 P. D. 109.

<sup>(2)</sup> *In the Goods of Wyatt*, 2 Sw. & Tr. 494.

<sup>(3)</sup> Williams on Executors, 8th edition, p. 220.

<sup>(4)</sup> As to the law on this subject with regard to wills dated prior to 1st January, 1838, which need now but rarely be referred to, see Browne on Probate, p. 128, *et seq.*

The object of the Wills Act, it has been judicially stated, was to provide one uniform mode of executing, revoking, and altering all wills of whatever description the property might be, and thus do away with all the anomalies and mischievous distinctions which had prevailed as to the disposition by will of property of different kinds <sup>(1)</sup>.

Sect. 21 of the Wills Act provides that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will.

The result is, that all interlineations, alterations, erasures, and obliterations which appear in wills made since the 31st of December, 1837, if they have been made subsequently to the execution of the will, are treated as invalid, and will not appear on the face of the probate, unless in the following cases:—

1. Where the interlineations or alterations have themselves been afterwards executed and attested in the same way as an original will, or where the testator signs his INITIALS, or (if unable to write) makes his MARK either in the margin of the will, or against such interlineations or alteration in the body of the will, and the attesting witnesses also add their initials.

2. Where the will has been re-executed since the interlineations or alterations have been made.

3. Where a codicil has been subsequently executed <sup>(2)</sup>.

#### 4. Revocation.

Revocation  
of will.

The subject of the revocation of a will has been already to some extent considered <sup>(3)</sup> (*ante*, p. 161).

The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revokes the former, or the two be incapable of standing together; for though it be a maxim, as Swinbourne says above, that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be submitted to probate as containing the last will of the

<sup>(1)</sup> *Brooke v. Kent*, 1 N.C. (P.C.) 95.

<sup>(2)</sup> *Browne on Probate*, p. 129; and see *In the Goods of Blewitt, deceased*, 5 P. D. 116, where the previous authorities are referred to. See also *Tyler v. Merchant Taylors' Co.*, 15 P. D. 216.

<sup>(3)</sup> See as to grant of limited probate, where part only of a will revoked by marriage (*ante*, p. 161), *In the Goods of G. B. Russell*, 15 P. D. 111; and see as to revocation of will by marriage: *Warter v. Warter*, 15 P. D. 152.



deceased. And, if a subsequent testamentary paper of the deceased be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent <sup>(1)</sup>.

Revocation  
of will.

In a case which came before the Court of Appeal in 1877, the facts were as follows:—A testator drew his pen through the lines of various parts of his will, wrote on the back of it, “This is revoked,” and threw it among a heap of waste papers in his sitting-room. A servant took it up and put it on a table in the kitchen. It remained lying about in the kitchen till the testator’s death seven or eight years afterwards, and was then found uninjured.

The Court decided that the will was not revoked. Lord Justice James, in delivering judgment, said: “It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention.” As it was put by Dr. Deane in the Court below, “All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying: there must be the two” <sup>(2)</sup>.

#### PROBATE OF WILLS OF MARRIED WOMEN.

Prior to the Married Women’s Property Act, 1882, probate of the will of a married woman was granted in a limited form, but, as was pointed out in a case decided in 1887, the policy of that Act having been to place a married woman, so far as her separate estate is concerned, in the position of a *feme sole*, probate is now granted in a general form <sup>(3)</sup>. The present practice, however, does not affect the beneficial interest of the husband <sup>(4)</sup>.

Probate of  
wills of  
married  
women.

The following is the substance of the new rules (15 and 18), passed March 29th, 1887. In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate personal estate of the testatrix or the power or authority under which the will has been, or purports to have been, made. The probate or letters of adminis-

<sup>(1)</sup> *Hellier v. Hellier*, 9 P. D. 237.

<sup>(2)</sup> *Cheese v. Lovejoy*, 2 P. D. 251. See *In the Goods of Thornton*, 14 P. D. 82, where probate was granted of a codicil torn by mistake; and see *Mills v. Millward*, 15 P. D. 20.

<sup>(3)</sup> *In the Goods of Amelia Price*,

12 P. D. 137, and see *In the Goods of Ann Homfray*, 12 P. D. 138 (in note). See also *In the Goods of Mary Hornbuckle*, 15 P. D. 149.

<sup>(4)</sup> *Smart v. Tranter*, 43 Ch. D. 587.

Probate of  
wills of  
married  
women.

tration with will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed, without any exception or limitation, and issue to an executor or other person authorized in the usual course of representation to take the same, a surviving husband, however, being entitled to the same in preference to the next of kin of the testatrix in case of a partial intestacy.

Married  
Women's  
Property  
Act, 1882.

It must also be borne in mind that the Married Women's Property Act, 1882, has not altered the devolution of a married woman's undisposed of personalty, and that accordingly, on her death, without disposing of her separate personalty, the quality of separate property ceases, and the husband's right to the undisposed of personalty arises just as if the separate use had never existed <sup>(1)</sup>.

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(<sup>1</sup>) *Stanton v. Lambert*, 39 Ch. D. 626, where the previous cases are considered along with the case of

*Amelia Price* and the Probate Rules of March, 1887, cited *supra*.

## CHAPTER IV.

## PROBATE OF THE WILL.

The word *probate* is generally applied to the piece of parchment, signed by the registrar and sealed with the seal of the Court (annexed to a parchment copy of the will), on which is engrossed a statement in the nature of a record, that on a certain day the will of the deceased (naming the day of death and place of abode of the deceased) was proved and registered, and that administration of his estate was granted to the executor, he having first sworn faithfully to administer <sup>(1)</sup>.

Any act done to a will after the testator's death does not alter its effect, if its contents can be ascertained. Thus, in a case where a will had been torn in pieces after the testator's death, the pieces had been found, the Court ordered the fragments to be pasted together, and granted probate of the will in common form <sup>(2)</sup>. Will torn  
in pieces.

Of several executors under a will, in equal degree, one may prove alone without notice to his co-executor or co-executors, power being reserved to the others to prove at a later period. Should he or they subsequently prove the will, which may be done at any time during the lifetime or after the death of the executor who has proved, the grant is called a *double* or *triple* probate, as the case may be. If any executor allows administration to be obtained, the right to probate is thereby extinguished, but proceedings may be taken to have the administration revoked <sup>(3)</sup>. Double or  
triple  
probate.

## RENUNCIATION.

"The office of executor being a private one of trust, named by the testator, and not by the law, the person nominated may refuse, though he cannot assign the office; and even if in the lifetime of the testator he has agreed to accept the office, it is still in his power to recede" <sup>(4)</sup>. Renuncia-  
tion.

Prior to the enactments to which we shall next refer, one of several co-executors might in the lifetime of his colleagues

<sup>(1)</sup> Browne on Probate, p. 203.

<sup>(3)</sup> Dixon on Probate, p. 254.

<sup>(2)</sup> *Knight v. Cook*, 1 Lee, pp. 413, 414.

<sup>(4)</sup> Williams on Executors, 8th ed. p. 278, citing Bacon's Abr.

renounce and then subsequently change his mind and enter upon the duties of his office, but now by the Probate Act of 1857 <sup>(1)</sup>, and the Amending Act of 1858 <sup>(2)</sup>, "Where any person after the commencement of this Act renounces probate of the will of which he is appointed executor, or one of the executors," and by sect. 16 of the Amending Act, "whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor in a will is cited to take probate, and does not appear to such citation, then the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor."

Lost wills.

Where a will has been lost or revoked, probate will be granted of a codicil, if the Court is satisfied that the testator intended the codicil to operate separately from and independently of the will <sup>(3)</sup>. The principle upon which the Court proceeds in cases of this description has been judicially stated as follows:—

"The question is entirely one of the intention of the deceased. Where a will and codicil have been in existence, and the will is afterwards revoked, it must be shown by the party applying for probate of the codicil alone, that it was intended by the deceased that it should operate separately from the will, otherwise it will be presumed that, as the will is destroyed, the codicil is also revoked" <sup>(4)</sup>.

Lord St.  
Leonards'  
will.

The whole subject of lost wills received careful consideration in the case of *Sugden v. Lord St. Leonards* <sup>(5)</sup>, decided in the year 1876. The result of the decision in that celebrated case may be shortly summarised as follows:—

Lost wills.

(1) The contents of a lost will, like those of any other instrument, may be proved by secondary evidence.

(2) Declarations, written or oral, made by a testator both before and after the execution of his will are, in the event of its loss, admissible as secondary evidence of its contents.

<sup>(1)</sup> 20 & 21 Vict. c. 77, s. 79.

<sup>(2)</sup> 21 & 22 Vict. c. 95, s. 16.

<sup>(3)</sup> *In the Goods of Greig*, L. R. 1 P. D. 72.

<sup>(4)</sup> Per The President, *In the Goods of Greig*, L. R. 1 P. D. 72.

<sup>(5)</sup> 1 P. D. 154, 250. This case was considered in the House of Lords in *Woodward v. Goulstone*, 11 App. Cas. 469, 485, where one of the Law Lords said: "I am quite willing to follow

the great judges who decided *Sugden v. Lord St. Leonards*, in the conclusions at which they finally arrived, but am not disposed to go one hair's breadth beyond. That case might be truly said to have reached the very verge of the law, and it ought not to be extended." See also as to probate of lost will, *Harris v. Knight*, 15 P. D. 170.

(3) The contents of a lost will may be proved by a single witness, even though interested, whose veracity and competency are unimpeached.

(4) Where the contents of a lost will are not completely proved, probate will be granted to the extent to which they are proved.

As a general rule the Court will not grant probate of the contents of a lost will, unless there is very cogent evidence that such a will did exist, and was in existence at the time of the death of the testator.

Special provision has been made by the Legislature for persons who desire to take extra precaution with reference to the safe custody of their wills. The Probate Act, 1857 <sup>(1)</sup>, enacts that "one or more safe and convenient depository or depositories shall be provided, under the control and directions of the Court of Probate, for all such wills of living persons as shall be deposited therein for safe custody; and all persons may deposit their wills in such depository upon payment of such fees, and under such regulations, as the judge shall from time to time by any order direct."

Depository  
for wills of  
living  
persons.

In another case, a testator left a holograph codicil, *i.e.* entirely in his own handwriting. The will was written on the first side of a sheet of foolscap, and the codicil on the third side. There was a regular attestation clause, and the testator had signed his name at the foot of the codicil, as there was no more space in the sheet, the names of the attesting witnesses appeared at the bottom of the second page opposite the attestation clause. The witnesses, who were clerks in the employment of the deceased, and had frequently witnessed papers for him, acknowledged their signatures, but stated that they had no recollection of having signed the paper, or ever having seen it before. The president proceeded on the familiar principle that *omnia presumuntur rite esse acta*, viz., all things are presumed to have been rightly done unless there is reasonable ground shown for doubting it, and admitted the codicil to probate <sup>(2)</sup>.

Presump-  
tion that  
all things  
are rightly  
done.

Where a will leaves only real estate, it is not entitled to probate. If, however, the will be of a man or a *feme sole*, the appointment of an executor is sufficient and the will is entitled to probate. The bare nomination of an executor without giving any legacy or appointing anything to be done by him, is sufficient to make the document a will, and as a will it has to be proved.

Will of  
real estate.

<sup>(1)</sup> 20 & 21 Vict. c. 77, s. 91.

<sup>(2)</sup> *Woodhouse and Another v. Balfour*, 13 P. D. 3.

Wills of married women.

The will of a married woman made during coverture under a power and disposing of real property only, was held not entitled to probate. In a case, however <sup>(1)</sup>, where a married woman possessed real property as separate estate and appointed an executor, and directed him to pay legacies and erect a memorial window, as there was personal property in the shape of arrears of rent the will was held entitled to probate.

In a recent case, where the will of a married woman dealing only with realty appointed executors, and a portion of the estate consisted of personalty vested in her under the Married Women's Property Act, the will was held entitled to probate <sup>(2)</sup>. See, as to the present practice in respect of married women (*ante*, p. 975).

Exemptions from probate or administration.

The following are the principal cases in which personalty is exempted from probate or administration :—

1. Navy money and effects under or amounting to £100 <sup>(3)</sup>.
2. Officers' and soldiers' pension, prize-money, and pay not exceeding £50 <sup>(4)</sup>.
3. Money and effects of merchant seamen not exceeding £50 <sup>(5)</sup>.
4. Deposits in savings banks for seamen <sup>(6)</sup>.
5. Deposits in savings banks not exceeding £50 <sup>(7)</sup>.

Superannuation Act, 1887.

The Superannuation Act, 1887, provides that on the death of a person to whom any sum not exceeding one hundred pounds is due from a public department in respect of any civil pay, superannuation, or other allowance, annuity or gratuity, then, if the prescribed public department so direct, but subject to the regulations (if any) made by the Treasury, probate or other proof of the title of the personal representative of the deceased person may be dispensed with, and the said sum may be paid or distributed to or among the persons appearing to the public department to be beneficially entitled to the personal estate of the deceased person <sup>(8)</sup>, or among such persons as the department may think fit, and the department shall be discharged from all liability in respect of any such payment or distribution.

Affidavits.

On applying for a grant of probate the executor must file the oath of office, *i.e.* the oath alluded to in the probate, and also

<sup>(1)</sup> *Brownrigg v. Pike*, 7 P. D. 61. See *In the Goods of Elizabeth Tomlinson*, 6 P. D. 209.

<sup>(2)</sup> *In the Goods of Cubbon*, 11 P. D. 169.

<sup>(3)</sup> 28 & 29 Vict. c. 111, the Navy and Marine's Property of Deceased Act.

<sup>(4)</sup> 11 Geo. 4 & 1 Will. 4, c. 41, s. 5.

<sup>(5)</sup> 2 & 3 Will. 4, c. 53, s. 25; 17 & 18 Vict. c. 104 (the Merchant Shipping Act, 1854).

<sup>(6)</sup> 19 & 20 Vict. c. 41.

<sup>(7)</sup> 26 & 27 Vict. c. 87.

<sup>(8)</sup> 50 & 51 Vict. c. 67, s. 8.

the affidavit for the Inland Revenue, to which is annexed an Affidavits.  
account of the personal estate of the deceased. No further affidavits are, as a rule, required, but circumstances may render additional evidence necessary.

Rule 4 provides that "if there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereunto be insufficient, the registrars must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove that the provisions of 1 Vict. c. 26, s. 9, and 15 Vict. c. 24, in reference to the execution, were, in fact, complied with."

By Rule 7, "If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the will or codicil; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact, and of the handwriting of the deceased and the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of due execution."

If a person has given instructions to a solicitor to make a will and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: "I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me, as carrying it out" <sup>(1)</sup>.

Instruc-  
tions to  
solicitors.

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<sup>(1)</sup> *Parker v. Felgate*, 8 P. D. 173.

## CHAPTER V.

## EXECUTORS.

“Let’s choose executors, and talk of wills” (¹).

**Executors.** An executor, as the term is at present accepted, says Mr. Justice Williams, may be defined to be “the person to whom the execution of a last will and testament of personal estate is, by the testator’s appointment, confided.”

In the language of an old authority (Swinburne), “To appoint an executor is to place one in the stead of the testator, who may enter to the testator’s goods and chattels, and who hath action against the testator’s debtors, and who may dispose of the same goods and chattels, towards the payment of the testator’s debts and performance of his will.”

**Who may be appointed an executor.** Generally speaking, we are told in Williams on Executors (²) all persons who are capable of making wills, and some others besides, may be executors.

It has been from the earliest times an established principle that every person may be an executor, saving such as are expressly forbidden. Thus the appointment of the Sovereign, of a corporation, of a partnership, of an alien, and it would seem even of an alien enemy, are all valid (³).

An infant who, as we have seen (*ante*, p. 961), cannot make a will, may be appointed executor, and even an infant *en ventre sa mère* may be so appointed, but if appointed sole executor he cannot act until he attains his majority; meanwhile, and until that time, administration with the will annexed is granted to his guardian, or some other person appointed by the Court.

A married woman, as we have seen, may be appointed executrix or administratrix, under the Married Women’s Property Act, 1882 (⁴).

The position of an executor differs essentially from that of an

(¹) Shakespeare, *Rich. II.*, Act iii. Scene 2.

(²) Williams on Executors, 8th ed. p. 232 *et seq.*

(³) 38 Geo. 3, c. 87, s. 6; Rules

P. R. Non. C. B., 33 to 36.

(⁴) See Married Women’s Property Act, 1882 (45 & 46 Vict. c. 75), s. 18, as to married woman being an executrix or trustee (*ante*, p. 224).



administrator, and most important consequences follow from the distinction. An administrator, on the one hand, is only the person appointed by the Court by Act of Parliament, in whom the deceased has reposed no confidence. The executor, on the other hand, is the person specially selected by the testator himself. His power and authority are therefore founded upon the special appointment by the testator.

Difference between an executor and an administrator.

This principle has been carried to its utmost logical consequence, for it has been decided that persons in mean and insolvent circumstances, and even persons convicted of felony, and outlaws, may be appointed executors. In the case of a bankrupt executor, it has, however, been the practice to interfere for the protection of the estate, by appointing a receiver, or compelling the bankrupt executor to give security before entering upon the duties of his office; but, if the person appointed executor be known by the testator to be a bankrupt or insolvent, a receiver will not be appointed on the ground of insolvency alone <sup>(1)</sup>; and even in a case where an executor had attempted to commit a fraud against the estate the Court granted him probate <sup>(2)</sup>.

Felons and outlaws.  
Bankrupts and insolvents.

In a case decided in 1875, very soon after the Judicature Act came into operation, the judge of the Probate, Divorce, and Admiralty Division proceeded on the principle that that Division had vested in it the jurisdiction formerly exercised by the High Court of Chancery, and he accordingly made an order prohibiting dealings with certain shares in a ship <sup>(3)</sup>.

Jurisdiction.

An executor can derive his appointment from a testamentary document only, but this appointment may be either express or constructive. "A will," said an old writer, "is the only bed where an executor can be begotten or conceived, but this must be taken to include a codicil." In other words, executors are appointed either by direct nomination or by a request to perform such duties in carrying out the provisions of the will as will constitute them executors. In the latter case they are called *executors according to the tenor*.

Appointment of executor.

Executor according to the tenor.

It is always a question of the testator's intention, and of the construction to be put upon the will, whether there is an appointment of an executor according to the tenor.

In a very recent case where a testator appointed trustees of his will, and directed them, after paying all his funeral and other expenses, to distribute the residue of his property in a certain manner, the Court considered that this was sufficient to con-

<sup>(1)</sup> See Williams on Executors, *Re Mary Hill*, 6 Jurist, 350.  
p. 239 *et seq.*

<sup>(3)</sup> *Nicholas v. Dracachis*, 1 P. D. 72.

<sup>(2)</sup> *Re Samson*, L. R. 3 P. & D. 48;

Executor  
according  
to the  
tenor.

stitute the trustees executors according to the tenor. The result of deciding otherwise, said the President, would be that the trustee, having got in the estate in accordance with the directions in the codicil, he would have to hand it over to the executors for them to hand it back again to him as trustee <sup>(1)</sup>.

In a case where a will contained a clause to the effect: "I appoint my sister A. B. my executrix, only requesting that my nephews C. D. and E. F. will kindly act for and with this dear sister," the Court decided that C. D. and E. F. were executors according to the tenor of the will <sup>(2)</sup>.

In a case decided in 1887 a testator by his will appointed two executors with the usual direction as to payment of debts, and also appointed the same persons trustees; after his death the will was found with the clause appointing executors cut out of it, and there was evidence of declarations by the testator that he had cut it out with a pair of scissors, with the intention of cutting out the name of one of the executors. The Court decided that the appointment of the executors was revoked by the publication of the will, and that the trustees were not to be treated as executors according to the tenor <sup>(3)</sup>.

Difference  
between  
an execu-  
tor and an adminis-  
trator.

Another very important distinction between the position of an executor and administrator may here be pointed out. The interest of an administrator is derived wholly from the Court of Probate, and only vests in him from the time of the grant of administration. The interest of an executor, on the other hand, in the estate of the deceased is derived exclusively from the will, and, therefore, vests in him from the moment of the testator's death. An executor is a complete executor for nearly all purposes before probate; he may release debts, get in the testator's estate, distrain, assent to legacies, or otherwise intermeddle with the estate. He may commence an action before probate, but he must produce the probate at the trial as proof of his title.

Executor  
*de son tort*.

In addition to executors who are appointed by "legal means," there is a class who assume the office by their "own intrusion and interference," as has been well laid down in Williams on Executors <sup>(4)</sup>. "If one, who is neither executor nor administrator, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law an executor of his own

<sup>(1)</sup> *In the Goods of Lush*, 13 P. D. 20.

<sup>(2)</sup> *In the Goods of Brown*, 2 P. D. 110, and see *In the Goods of the Earl*

*of Leven and Melville*, 15 P. D. 22.

<sup>(3)</sup> *In the Goods of Maley*, 12 P. D. 134.

<sup>(4)</sup> 8th ed. vol. i. p. 261.

wrong, or more usually, an executor *de son tort*." A very slight interference with the estate of the deceased will constitute a person executor *de son tort*. Taking a Bible in one old case, and a bedstead in another, were held sufficient to constitute an executorship *de son tort* <sup>(1)</sup>. Demanding or receiving the debts of the deceased <sup>(2)</sup>, or paying the same with the moneys of the deceased, will constitute a person executor *de son tort*.

Executor  
*de son tort*.

In a very recent case it was held that an auctioneer who sold the assets was liable as an executor *de son tort*, unless he was able to show that he acted for an executor who had proved the will <sup>(3)</sup>.

A person, however, is not rendered an executor *de son tort* by reason of discharging offices which are merely those of kindness and charity, such as giving directions for a funeral (for if that were the law as was said in an old case <sup>(4)</sup> "the deceased could not be buried by any one from the apprehension of being involved as executor); locking up the goods for preservation <sup>(5)</sup>; making an inventory of the property <sup>(5)</sup>; feeding the cattle <sup>(6)</sup>; repairing the houses; or providing necessaries for the children of the deceased <sup>(5)</sup>. A person who deals with the goods of a testator as agent of the executor, cannot be treated as executor *de son tort*, whether the will has been proved or not <sup>(7)</sup>.

If, for the purpose of providing the funeral, a person receives a debt due to the estate of the deceased, this will not render him an executor *de son tort*, unless he receive a larger sum than is reasonable for such purpose, having regard to the estate and condition of the deceased <sup>(8)</sup>.

It is provided by Lord St. Leonards' Act (22 & 23 Vict. c. 35), that where executors or administrators have given such or the like notices, as in the opinion of the Court in which such executor or administrator is sought to be charged, would have been given by the Court in an administration action for creditors and others to send in their claims, they may, after the expiration of the time named in the notices, distribute the assets, having regard to the claims of which they have notice, and are not to be liable in respect of claims of which they have no notice. This provision, however, is without prejudice to the rights of

Notices to  
creditors.

(1) *Robin's Case*, Noy, 69; Toller, 38.

(2) Godolph, pt. ii. c. 8, s. 1; Swinb., pt. iv. s. 23.

(3) *Nulty v. Fagan*, 22 L. R. Ir. 604.

(4) *Harrison v. Rowley*, 4 Ves. Jun. 216

(5) Godolph, pt. ii. c. 8, s. 6.

(6) Godolph, pt. ii. c. 8, s. 8.

(7) *Sykes v. Sykes*, L. R. 5 C. P. 113.

(8) *Camden v. Fletcher*, 4 M. & W. 378.

creditors or claimants to follow the assets into the hands of those who have received them <sup>(1)</sup>.

Transmis-  
sion of  
office of  
executor.

The position of an executor is based upon the personal confidence of the deceased. It follows as a logical consequence from this that the executor so appointed may transmit his power to another in whom he has a similar confidence. So long, therefore, as the chain of representation founded on personal confidences is unbroken, the last executor represents the original testator. The administrator of an executor is, however, only an officer of the Court, in whom no personal confidence is reposed, and on his appointment the chain is broken, and he has no connection with the estate of the original testator <sup>(2)</sup>.

Executor  
of an exe-  
cutor.

Suppose A. accepts and acts in the executorship of B., but dies before that executorship is complete. He leaves a will, and appoints C. executor. Can C., if he proves A.'s will, renounce the executorship of B.? It has been decided that C. by accepting office of executor to A. becomes the representative of B., and is bound to administer B.'s estate. An executor cannot renounce probate of the first will and take probate of the second <sup>(3)</sup>.

<sup>(1)</sup> *Clegg v. Rowland*, L. R. 3 Eq. 368; *Wood v. Weightman*, L. R. 13 Eq. 434; *Newton v. Sherry*, 1 C. P. D. 246. It has been decided that there is no absolute rule that a notice to creditors and others, under sect. 29 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), must be in a London paper, or that a month must be allowed for bringing in claims, and that in deciding whether a notice is sufficient the Court will give regard

to all circumstances, *e.g.*, the residence of the testator—his position in life: *Re Bracken*, 43 Ch. D. 1.

<sup>(2)</sup> Williams on Executors, p. 258, *et seq.*

<sup>(3)</sup> Hallilay's Digest, p. 32, citing *Brooke v. Haymes*, L. R. 6 Eq. 25; *Re Perry*, 2 Curt. 655. It should be borne in mind that an executor (by 1 Wm. 4, c. 40) holds undisposed of residue in trust for the next of kin of his testator.

## CHAPTER VI.

## ADMINISTRATION.

Administration may be granted—

Adminis-  
tration.

(1) With the will annexed;

(2) In case of intestacy.

ADMINISTRATION WITH THE WILL ANNEXED (CUM TESTAMENTO  
ANNEXO).

Administration with the will annexed is granted in the following cases:—

Adminis-  
tration  
with the  
will  
annexed.

(1) Where no executor is appointed, or the executor appointed under the will dies before the testator, or before he has proved the will, or where he is incapable of acting.

(2) Where the person appointed refuses to act.

(3) Where the executor dies intestate after proving the will, but without having fully administered the estate.

(4) Where the Court appoints an administrator under the 73rd section of the Probate Act (1).

The Court, in granting administration with the will annexed, prefers the claim of the residuary legatee to that of the next of kin or of a pecuniary legatee, the reason being that, as he takes only the residue, he is, therefore, interested in keeping down charges, so that the residue may be as large as possible (2).

## LETTERS OF ADMINISTRATION.

Letters of administration may be defined as an authority granted by the Probate Division, under the seal of the Court, to the administrator named therein, to duly administer the personal estate of a deceased intestate (3).

Letters of  
adminis-  
tration.

The order in which administration is granted to the next of kin, "the order of preference," as it is sometimes called, is as follows:—

Order in  
which ad-  
ministra-  
tion is  
granted.

(1) Husband or wife.

(1) See *In the Goods of Batterbee*, 14 P. D. 39.

(2) Browne on Probate, p. 151; Williams on Executors, 8th ed. p. 1464. See *In the Goods of Covell*, 15 P. D. 8.

(3) See as to time when Statute of Limitations begins to run, *Atkinson v. The Bradford Third Equitable Benefit Building Society*, 25 Q. B. D. 377.

Order in which administration is granted.

- (2) Child or children.
- (3) Grandchild or grandchildren.
- (4) Great-grandchildren until the direct lineal descendants of the intestate to the remotest degree are exhausted.
- (5) Father.
- (6) Mother.
- (7) Brothers and sisters.
- (8) Grandfathers or grandmothers.
- (9) Nephews and nieces, uncles, aunts, great-grandfathers or great-grandmothers.
- (10) Great-nephews, great-nieces, &c. (of whom all, in an equal degree, are equally entitled) until the collateral relations of the intestate to the remotest degree are exhausted.

Deaths of husband and wife.

It has been decided that where the deaths of the husband and wife have taken place at about the same time, viz., where there is no evidence that one survived the other, the next of kin of each is entitled to a grant of administration <sup>(1)</sup>.

Married woman administratrix.

Since the Married Women's Property Act, 1882, when a married woman is administratrix, it is not necessary that her husband should join in the administration bond. "A husband," said the President, "incurs no responsibility by reason of his wife accepting the office of administratrix, and, as the grant confers no benefit upon him, the reason for the old practice fails and his concurrence is no longer necessary <sup>(2)</sup>."

Grant to creditor.

In the year 1877 the President laid down the practice that administration should not be granted to a creditor (whether the other creditors are present or not to make objection), unless he enters into a bond to pay all the debts *pro rata*, i.e., rateably, if so required by the Court <sup>(3)</sup>.

Administration bond.

A marked difference between the practice in regard to probate and administration arising from the different nature of the offices of executor and administrator is, that as the testator has reposed a personal confidence in the executor, no security is necessary from him, while, on the other hand, all administrators, without exception, must find security for faithfully administering the estate. The bond is in a penalty of double the amount of the estate, unless it be thought fit to reduce it.

Security.

A case of some importance on this subject was recently decided. An estate was being administered in the Chancery Division, and an order had been made directing that each individual share of the property should be paid directly to the

<sup>(1)</sup> Wheeler, 31 L. J., Prob. 40.

<sup>(3)</sup> *In the Goods of Brackenbury*,

<sup>(2)</sup> *In the Goods of Harriet Ayres*, 2 P. D. 272.  
8 P. D. 168.

parties entitled. Under these exceptional circumstances the judge, while stating that the Court as a general rule, was averse to dispensing with justifying securities, allowed the security to be limited to twice the amount of the applicant's beneficial interest <sup>(1)</sup>.

Where a person has not been heard of for seven years the Court will presume that he is dead, but will not make any presumption as to the time when he died. In a case where administration was applied for, and the estate consisted in part of a policy of insurance on the life of the person whose death the Court was asked to presume, the Court ordered notice of the application to be given to the insurance company. The principle upon which the judge proceeded was, that those who were interested in showing that the man was alive ought to have an opportunity of doing so if they could <sup>(2)</sup>.

Presumption of death.

In a very recent case <sup>(3)</sup> where a man had died intestate, and an application was made for a grant of administration to his father, passing over his widow, against whom charges of misconduct were made, the judge said that he did not think that such a grant had ever been made without giving the person against whom such charges were alleged an opportunity of answering them, and that to do so would be to open a very wide door to misrepresentation, and he accordingly required that the widow should be cited.

Charges of misconduct.

The Court has power, in cases where it is necessary or convenient by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be administrator of the personal estate of the deceased other than the person who would have been entitled to the grant <sup>(4)</sup>.

Appointment of administrator by the Court.

<sup>(1)</sup> *Re Paxton*, 14 P. D. 40, and see *In the Goods of Morris*, 15 P. D. 9. See as to grant to official receiver in bankruptcy, *In the Goods of Cope*, 15 P. D. 107, and as to grant *ad colligendum* being given to a creditor where there are no known relatives of a deceased widow, *In the Goods of Anne Ashley*, 15 P. D. 120.

<sup>(2)</sup> *In the Goods of H. T. Barber*, 11 P. D. 78, and see *In the Goods of Amelia Clark*, 15 P. D. 10.

<sup>(3)</sup> *In the Goods of Middleton*, 14 P. D. 23.

<sup>(4)</sup> 20 & 21 Vict. c. 77, s. 73; *In the Goods of Elizabeth Wensley deceased*, 7 P. D. 13.

## CHAPTER VII.

## CONTENTIOUS BUSINESS.

- Definition.** Contentious business is defined by the statute (Court of Probate Act, 1857) to include everything that is not common form except the warning of caveats <sup>(1)</sup>.
- Entry of caveat.** The first step in the direction of litigation in probate proceedings, though of course proceedings are not really commenced until an action is commenced by the issue of a writ, is the entry of a caveat.
- Caveat.** A caveat is a caution or notice to the principal registrar, or to the registrar of the district in which the deceased died, to do nothing in the matter of the deceased's estate without notice to the person lodging it or his solicitor.
- Entry and notice of caveat.** Any person may enter a caveat regarding a deceased person's estate, and when he has done so a notice must be served upon him by the executor or administrator of any steps he purposes to take in relation to the estate either under the will or under intestacy.
- Rules as to caveats.** The rules in the principal registry relating to caveats are: rule 59, which deals with the entry of the caveat; rule 60, which deals with its date and duration; rule 61, which deals with the notice of entry; and rule 62, which points out the grants not affected by the caveat.
- These rules are as follows :—
- Rule 59.** Any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his proctor, solicitor, or attorney, enter a caveat in the principal registry, or in a district registry; if in the principal registry, the person entering the caveat must also insert the name of the deceased in the index to the caveat book.
- Rule 60.** A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months only, and then expire and be of no effect; but caveats may be renewed from time to time.

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<sup>(1)</sup> The procedure and practice in common form, in the Probate Division of the High Court, are the same as

were in force in the Court of Probate before the passing of the Judicature Act, 1873.



Rule 61. The registrars, principal or district, shall, immediately upon a caveat being entered, send notice thereof, the former to the district registrar of any district in which it is alleged the deceased resided at the time of his death, or in which he is known to have had a fixed place of abode at the time of his death, and the latter shall do this also, and in addition send notice to the principal registrar.

Rules as to caveats.

Rule 62. No caveat shall affect any grant made on the day on which the caveat is entered, or on the day on which notice is received of a caveat having been entered in a district registry, or in the principal registry.

The objects which the caveator may have in view in lodging a caveat may be various: viz. to deny the jurisdiction of the Court <sup>(1)</sup> or to protect a will, and of course to dispute it <sup>(2)</sup>; to make inquiries which may be followed by withdrawal of the caveat if the result of the inquiries prove satisfactory, or by opposition to the grant, should their result be unsatisfactory.

Objects of caveat.

The withdrawal or subducing of the caveat leaves the Court free to act without notice to the caveator <sup>(3)</sup>.

Withdrawal of the caveat.

Assuming that the caveat is not withdrawn, the next step is the warning or notification to the party lodging the caveat to enter an appearance to the warning and set forth his interest in the deceased's estate, otherwise the person warning the person who issued the caveat will proceed to obtain a grant of probate or administration <sup>(4)</sup>.

The warning.

Caveats may be lodged in a principal or district registry.

The rules as to warnings provide (1) that all caveats shall be warned from the principal registry, and that the warning is to be left at the place mentioned in the caveat as the address of the person who entered it; (2) that it shall be sufficient for the warning of a caveat that a registrar send by the public post a warning signed by himself, and directed to the person who entered the caveat, at the address mentioned in it; (3) that the warning to a caveat is to state the name and interest of the party on whose behalf the same is issued, and, if such person claims under a will or codicil, that it is also to state the date of such will or codicil, and is to contain an address within three miles of the General Post Office, at which any notice requiring service may be left <sup>(5)</sup>.

<sup>(1)</sup> *Frank v. Aubrey*, 2 Lee. 534.

Prob. 16.

<sup>(2)</sup> *Ingram v. Strong*, 2 Phillim. 313.

<sup>(4)</sup> See the form of Warning, Form No. 33, Principal Registry.

<sup>(3)</sup> *Goddard v. Smith*, 42 L. J.

<sup>(5)</sup> Rules 63, 64, 65.

Form of  
warning.

The form of warning is supplied in the registry.

Appear-  
ance.

The warning having been given, the next litigious step is the appearance by the caveator.

Issue of  
writ.

The caveator having appeared, the party warning the caveat then issues a writ against the caveator making him defendant in the capacity in which he is described in his appearance to the caveat, and the action then proceeds like an ordinary action.

Nature of  
caveat.

The nature of a caveat was carefully considered by the President in a case decided in 1872. Arthur Goddard having found a will of William Goddard, dated in 1871, appointing him sole executor, gave notice of the fact to Joseph Smith, who was about to obtain a grant of administration with a will annexed, dated 1870, and entered a caveat. Before the caveat had been warned, Arthur Goddard withdrew it, and made a communication to the effect that he did not intend to attempt to prove the will of 1871, and administration with the earlier will annexed accordingly issued to Joseph Smith. Subsequently Arthur Goddard called upon Joseph Smith to bring in the administration and show cause why it should not be revoked. The question then arose whether Arthur Goddard ought to be allowed to proceed or whether he was, as it is technically called, "estopped," from maintaining the suit on the well-established principle (see *ante*, p. 863) that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, he cannot afterwards aver that a different state of things existed at that time.

The President, in delivering judgment allowing Arthur Goddard to proceed, expressed himself as follows:—

"The principle of estoppel appears to me inapplicable to the present case. The plaintiff did not by withdrawing the caveat cause the defendant to believe in any state of facts, or to alter his position; he merely left him free to pursue his own course unopposed, namely, to take a grant in common form if he so pleased. Nor can the withdrawal of a caveat be properly likened to a discontinuance of a defence to legal proceedings. The caveat is a mere caution to the Court; contentious proceedings do not begin until an appearance is entered to the warning of the caveat; and by the previous subduction the caveator only leaves the Court free to act without notice to him" <sup>(1)</sup>.

Citing the  
heir-at-  
law.

Where probate proceedings are taken to prove or revoke a will in solemn form, or when a will is disputed in any matter

(<sup>1</sup>) *Goddard v. Smith*, 3 P. & D. 7.

under the Probate Act, unless it affects only the personalty the heir-at-law, devisees, or other persons having or claiming interest in the real estate affected by the will may be summoned "to see proceedings," and unless they are before the Court they are not bound by the proceedings.

Administrators and receivers may be appointed *pendente lite*, when the estate is likely to suffer during the action concerning it <sup>(1)</sup>.

Adminis-  
trators and  
receivers  
pending  
suit.

Probate actions are of three kinds :—

Probate  
actions.

1. Actions for proving wills in solemn form, more generally known and spoken of as will cases.

2. Administration actions in which the plaintiff claims administration as next of kin, and his interest is disputed.

3. Actions to revoke grants of probate or administration and to obtain such other grant as the circumstances of the case may require <sup>(2)</sup>.

Where a bastard testator dies without relations, as the Crown would have an interest in his estate under intestacy, the Queen's Proctor must be cited when the will is proved <sup>(3)</sup>.

Bastards'  
wills.

The writ of summons in a probate action cannot be issued out of a district registry (R. S. C., Order v., r. 1).

Writ of  
summons.

Order v., rule 15, provides that: 'The issue of a writ of summons in Probate actions shall be preceded by the filing of an affidavit made by the plaintiff, or one of the plaintiffs, in verification of the endorsement on the writ <sup>(4)</sup>.

Verifying  
affidavit.

In probate actions the plaintiff unless the Court directs otherwise must deliver his statement of claim within six weeks after the defendant's appearance, or from the time limited for his appearance, but he cannot be ordered to deliver it until eight days after the defendant has filed his affidavit of scripts if the defendant appears. When the plaintiff disputes the defendant's interest he must state so in his statement of claim (R. S. C., 1883, Order xx., rr. 1-9).

Delivery of  
statement  
of claim.

The rules still applying to scripts and affidavits of scripts are the old rules 30, 31 and 32, and 75 in contentious business <sup>(5)</sup>.

Scripts.

<sup>(1)</sup> *In the Goods of Timothy Evans*, 15 P. D. 215.

<sup>(2)</sup> See *Smart v. Tranter*, 43 Ch. D. 857, reversing 40 Ch. D. 165.

<sup>(3)</sup> *Wyman v. Ashwell*, 29 L. J. Prob. 94.

<sup>(4)</sup> *In the Goods of Thom*, 13 P. D. 36.

<sup>(5)</sup> See Forms, Statement of Claim for probate in solemn form, No. 2, Appendix C., Sect. 3, Judicature

Act; and see, as to practice, *Riding v. Hawkins*, 14 P. D. 56; *Lancaster v. Brook*, 14 P. D. 80.

The preceding form in this appendix applies to an interest suit.

For the defences to a will claim, see Appendix D., Sect. 3, No. 2. Other pleas framed to meet the exigencies of particular cases may also be pleaded as when the testator has married since the execution of the

Scripts.

These rules provide as follows:—

30. In testamentary causes the plaintiff and defendant, within eight days of the entry of an appearance on the part of the defendant, are respectively to file their affidavits as to scripts, whether they have or have not any script in their possession <sup>(1)</sup>.

31. Every script which has at any time been made by or under the direction of the testator, whether a will, codicil, draft of a will or codicil, or written instructions for the same, of which the deponent has any knowledge, is to be specified in his affidavit of scripts; and every script in the custody or under the control of the party making the affidavit is to be annexed thereto, and deposited therewith in the registry.

32. No party to the cause, nor his proctor, solicitor, or attorney, shall be at liberty, except by leave of the judge or of one of the registrars of the principal registry, to inspect the affidavit as to scripts, or the scripts annexed thereto, filed by any other party to the cause, until his own affidavit as to scripts shall have been filed.

75. When any pencil writing appears on a will, script, or other document filed in the registry, a fac-simile copy of the will, script, or other document, or of the pages or sheets thereof, containing the pencil writing, must also be filed with those portions written in red ink which appear in pencil in the original. Such copy must be examined by an examiner in the registry.

Notice in probate actions.

Under Order XXI., rule 18, the party opposing a will may give notice to the party setting it up that he merely insists upon its proof in solemn form, and only intends to cross-examine the witnesses produced in support of it, and this course in the absence of exceptional circumstances frees him from liability for costs. In other words the parties interested in another will or under an intestacy may call upon the parties claiming under a will to prove it in solemn form, and may cross-examine the witnesses who support it without being liable for costs, but they must deliver such notice with their defence <sup>(2)</sup>.

Particulars.

In a case which came before the Court of Appeal, the defence alleged that the execution of the said wills and codicil were procured by the undue influence of the plaintiff "and others." The plaintiff applied for particulars of the names of the persons

will propounded, marriage being a revocation of a will made before marriage. 1 Vict. c. 26. s. 18 (see *ante*, p. 161). See, as to county court jurisdiction in probate matters, 21 & 22

Vict. c. 95, s. 10; O. XLIX. County Court Rules, 1889.

<sup>(1)</sup> Browne, 680.

<sup>(2)</sup> See *Leeman v. George*, 1 P. & D. 542; *Bone v. Whittle*, 1 P. & D. 249.

charged with undue influence and particulars of the acts of undue influence alleged, and the times when and places where each of the acts was alleged to have taken place. The Court of Appeal decided, affirming the President's decision, that the "old, settled, and well established" practice of the Probate Division (which in the opinion of the majority of the Court founded on good reason) must be adhered to, and that the particulars that could be ordered were the names of the parties charged with undue influence, but not the particulars of the acts of undue influence <sup>(1)</sup>.

Particulars.

By a curious slip no provision is made in the Rules of the Supreme Court with regard to the time within which an appeal must be brought from an order made by a registrar of the Probate Division. It has, however, been settled by the Court of Appeal, that as the registrars are not like the chief clerks in the Chancery Division, deputies of the judge, but have positions similar to those of the masters of the Queen's Bench Division, the rule with regard to appeals from the masters must be taken to apply to them, and that accordingly the appeal must be brought within four days from the decision <sup>(2)</sup>.

Appeals from registrars.

In a case where the judge refused a grant of administration on the ground that the applicant was not a creditor of the intestate, it was held that an appeal lay from the judge's decision to the Court of Appeal <sup>(3)</sup>.

With regard to the powers of district registrars, the Probate Act, 1857, provides that "probate of a will or letters of administration may, upon application for that purpose to the district registry, be granted in common form by the district registrar, in the name of the Court of Probate, and under the seal appointed to be used in such district registry, if it shall appear by affidavit of the person, or some or one of the persons applying for the same, that the testator or intestate (as the case may be) at the time of his death, had a fixed place of abode within the district in which the application is made." The place of abode of the deceased must be stated in the affidavit, and the probate or letters of administration when granted have effect over the personal estate of the deceased in all parts of England.

Powers of district registrars.

A subsequent section provides that the district registrar shall not grant probate or administration in any case in which there

(1) *Lord Salisbury v. Nugent*, 9 P. D. 23. In a case decided in 1889 the Court allowed the plaintiff to amend his pleadings after the defendant's case had been closed, so as

to raise a charge of fraud.

(2) *In the Goods of John Patrick*, 14 P. D. 42.

(3) *Re Clook*, 15 P. D. 132.

Powers of  
district  
registrars.

is contention as to the grant, until such contention is terminated or disposed of by decree or otherwise, or in which it otherwise appears to him that probate or administration ought not to be granted in common form.

As it is not unlikely that the district registrar may occasionally find himself face to face with a problem of considerable difficulty, a correction to his possible *inopia consilii* (to borrow Mr. Coote's phrase) is provided by another section, which provides, "In every case where it appears to a district registrar that it is doubtful whether the probate or letters of administration which may be applied for should or should not be granted, or where any question arises in relation to the grant of any probate or administration, the district registrar shall transmit a statement of the matter in question to the registrars of the Court of Probate, who shall obtain the directions of the judge in relation thereto, and the judge may direct the district registrar to proceed in the matter of the application according to such instructions as to the judge may seem necessary, or may forbid any further proceeding by the district registrar in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Court of Probate through the principal registry or (if the case be within its jurisdiction) to a county court."

Option as  
to district  
registry.

It is, however, purely optional for the applicant to apply to a district registry for a grant of probate or administration, as the Act provides that "it shall not be obligatory on any person to apply for probate or administration to any district registry or through any county court" <sup>(1)</sup>.

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(<sup>1</sup>) 20 & 21 Vict. c. 77, s. 59, and rule 1, Rules of 1862.

## BOOK X.

### DIVORCE.

#### CHAPTER I.

##### JURISDICTION.

The jurisdiction in divorce and matrimonial matters now vested in the Probate, Divorce, and Admiralty Division of the High Court of Justice <sup>(1)</sup>, was originally given to the Divorce Court, then first created by the Act passed in 1857 <sup>(2)</sup>, to amend the law relating to divorce and matrimonial causes in England. Before that Act complete relief from the matrimonial bond could only be obtained by means of a private Act of Parliament, which is still occasionally resorted to in respect to cases which come from Ireland.

Creation of  
Divorce  
Court.

Under the system existing prior to 1857 in England, and still existing, so far as Ireland is concerned, three distinct tribunals had to be resorted to:—

1. A Court of law for damage against the adulterer. “The ancient but not venerable” action for criminal conversation or “*crim. con.*” as it was called was abolished by 20 & 21 Vict. c. 85, s. 59.

2. A Court Ecclesiastical for divorce *a mensâ et thoro*, equivalent to a judicial separation; and

3. The Imperial Parliament for a dissolving statute <sup>(3)</sup>.

See, as to the practice of the House of Lords in respect of Divorce Bills, *post*, p. 1046.

The jurisdiction of the Divorce Division is confined to matters matrimonial in England. England, as defined by Act of Parliament <sup>(4)</sup> explained by the decisions of the Court, signifies England, Wales, and Berwick-on-Tweed, but not the Isle of Man or the Channel Islands. All other countries are foreign to the Divorce Division. “The Court,” as was said by a celebrated judge in a celebrated case, “is a Court for England, not for the United Kingdom or for Great Britain; and for the purposes of

Territorial  
extent of  
jurisdiction.

<sup>(1)</sup> Judicature Act, 1873, s. 34.

Parliamentary Divorce, 465, *et seq.*

<sup>(2)</sup> 20 & 21 Vict. c. 85.

<sup>(4)</sup> 20 Geo. 2. c. 42, s. 3, and see

<sup>(3)</sup> See Macqucen's Practice of

Ford's Matrimonial Law, p. 2.

this jurisdiction, Ireland and Scotland are to be deemed foreign countries equally with France or Spain" (1).

The expression "Divorce and matrimonial causes," implies that the first question arising will relate to the marriage in consequence of which the suit is brought, for, unless there has been at least a ceremony of marriage, there can be no inquiry in the matrimonial court.

English  
and foreign  
marriages.

Marriages which render matrimonial proceedings necessary here in England may be classed under two titles, foreign and English. Foreign marriages, are marriages contracted out of England, or with a man who has a foreign domicile.

All marriages which are the subject of judicial inquiry here must have been contracted in accordance with the marriage law of the country in which the ceremony was performed, *i.e.* according to the *lex loci contractus* (2), and on the same basis as marriages throughout Christendom, which have for their object the voluntary union for life of one man and one woman to the exclusion of all others.

In a case decided this year, in which the authorities in the law as to the validity of a marriage were carefully considered, the question was whether a marriage which had been contracted in Bechuanaland, according to the customs of a tribe among whom polygamy was allowed, was a valid one. The marriage ceremony was thus described: "When the consent of the parents has been obtained the bridegroom slaughters a sheep, a buck, an ox, or cow. The head of the animal is taken to the bride's parents, as also is the hide, which is cleaned and softened. They are then considered married, and after the birth of the first child the number of the cattle previously agreed upon is handed over to the wife's parents" (3).

The Court decided that this union was not a valid marriage according to the law of England. "I am bound," said the judge, "by the authorities, to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England, unless it be formed on the same basis as marriages throughout Christendom, and be in its essence 'the voluntary union for life of one man and one woman to the exclusion of all others.'"

We come now to English marriages.

(1) Per Sir Cresswell Cresswell, *Yelverton v. Yelverton*, 1 Sw. & Tr. 586 (1859).

(2) *Sottomayor, otherwise De Barros*

v. *De Barros*, 3 P. D. 1.

(3) *Re Bethell. Bethell v. Hildyard*, 38 Ch. D. 220.



*English Marriages.*

In order that an English marriage should be valid, it is necessary—

Requisites  
of mar-  
riage.

1. That the parties should be capable of contracting marriage, *i.e.*, they must be single persons, not within the prohibited degrees of consanguinity or affinity, and there must be consent, sound mind, and ability to perform the duties of matrimony (see *post*, Nullity of Marriage).

2. That the form, place, and time of marriage should be according to law <sup>(1)</sup>.

## THE FORM OF MARRIAGE.

The forms and ceremony of marriage are chiefly regulated by 4 Geo. 4, c. 76, and 6 & 7 Will. 4, c. 85, and the other "Registration Acts."

Marriage can be effected in four different ways:—

1. By banns.
2. By common licence.
3. By special licence.
4. By a registrar's certificate.

(1.) With licence.

(2.) Without licence <sup>(2)</sup>.

An Act to be cited as the Marriage Act, 1890 (53 & 54 Vict. c. 47), which came into operation on Jan. 1, 1891, provides, among other things, that every marriage between parties *of whom one at least is a British subject*, which shall be solemnized in accordance with the provisions of the Act in the house of any British ambassador or minister residing within the country to the Court of which he is accredited, shall be deemed and held to be as valid in the law as if it had been solemnized within the United Kingdom with a due observance of all forms required by law, and the Consular Marriage Acts, as amended by the Act, and as modified by adaptations made in pursuance of the Act, shall apply accordingly. Regulations on the subject may be made by the Queen in Council.

It is also provided by the same Act that every marriage

(1) See Ford's Matrimonial Law, where the law is summed up as follows: "The rules as to mode and place of marriage are liable to certain qualifications for the protection of either party to the contract who may have acted in good faith. But consent, sound mind, and capacity,

are essential ingredients of a valid marriage, citing *Durham v. Durham*, 10 P. D. 80; *Hunter v. Edney*, 10 P. D. 93; *Cannon v. Smalley*, 10 P. D. 9; and see Browne and Powlis on Divorce, 5th ed. p. 148, *et seq.*; Dixon on Divorce, p. 10, *et seq.*

(2) Dixon on Divorce, p. 17.

between parties of whom one at least is a British subject which, from and after the commencement of this Act, shall be solemnized in accordance with the provisions of this Act on board one of Her Majesty's vessels on a foreign station, shall be deemed and held to be as valid in the law as if the same had been solemnized within the United Kingdom with a due observance of all forms required by law.

Marriage  
by banns.

When the marriage is by banns the statute<sup>(1)</sup> prescribes that the "Banns shall be published in an audible manner in the parish church or in some public chapel in which banns may be lawfully published, of or belonging to the parish or chapelry wherein the persons to be married shall dwell, according to the prescribed form of words and at the prescribed time, upon Three *Sundays* preceding the solemnization of the marriage; and whensoever it shall happen that the persons to be married shall dwell in divers parishes or chapelries, the banns shall, in like manner be published in the church or in the chapel as before mentioned, belonging to the parish or chapelry wherein *each* of the said persons shall dwell." It is also provided that if any persons shall knowingly and wilfully intermarry without one publication of banns the marriage shall be void to all intents and purposes.

The statute further enacts—

Marriage  
by banns.

"All other rules prescribed by the Rubric on the subject, shall be duly observed, and that in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where the banns shall have been published and in no other place whatsoever."

Common  
licence.

The common licence is that of the Ordinary or Surrogate of the place where the ceremony is performed.

Special  
licence.

The special licence is that of the Archbishop of Canterbury<sup>(2)</sup>.

#### THE CEREMONY OF MARRIAGE.

The ceremony, if after banns in a church, must until 10th of May, 1886, have been performed by a clergyman, between the hours of 8 and 12 A.M.<sup>(3)</sup>, and attested by two other witnesses<sup>(4)</sup>. It may now, since the passing of the Marriage Act,

<sup>(1)</sup> 4 Geo. 4, c. 76, s. 2; and see *Templeton v. Tyree*, 2 P. & D. 420.

<sup>(2)</sup> See as to special licence: 25 Hen. 8, c. 21; and as to common licence, 10 & 11 Vict. c. 98, s. 5. All questions concerning marriage

licences were excepted from the jurisdiction of the Divorce Court: Matrimonial Causes Act, 1857, ss. 2 and 6.

<sup>(3)</sup> 4 Geo. 4, c. 76, ss. 21 and 27.

<sup>(4)</sup> *Ibid.* s. 27.

1886 (49 & 50 Vict. c. 14), which does not extend to either Scotland or Ireland, be performed from 8 A.M. until 3 in the afternoon.

### THE PLACE OF MARRIAGE.

The place may be any registered place of worship registered also for marriages <sup>(1)</sup>.

The district registrar of births and deaths is now a marriage registrar also <sup>(2)</sup>.

When a marriage is intended to be celebrated otherwise than by licence or banns, one of the parties having produced the registrar's certificate, shall give notice in the prescribed form in or to a like effect, to the superintendent registrar of the district the parties have resided in for seven days, or if they have resided in different districts, then to the registrar of each district, the notice to contain their correct names, addresses, and descriptions, the time they resided in the district, the church or building where they are to be married, and a statement that one or other of the parties has resided in the place named a month or more, if such is the fact <sup>(3)</sup>.

Marriage may be proved by the evidence of a person present at the marriage, but is usually proved by the production of an examined copy of the register, or one purporting to be signed by the proper officer, and some evidence identifying the person named in the register as the petitioner and respondent. Identification is a question of fact, to be proved like any other conclusion of fact, and established either by direct or circumstantial evidence. Marriage may also be proved by reputation or by cohabitation. In a suit for dissolution of marriage, formal proof of the marriage is not indispensable, but sufficient evidence must be produced to satisfy the Court <sup>(4)</sup>. If the marriage be foreign, the usual proof is production of documentary evidence, along with the testimony of one of the parties, and also express evidence, if necessary, of proof that the marriage was celebrated according to the law of the place.

Proof of marriage.

The marriage contract has been regulated by a number of statutes, which are enumerated in the note hereto <sup>(5)</sup>.

<sup>(1)</sup> 6 & 7 Wm. 4, c. 85, s. 11; 7 Wm. 4; 1 Vict. c. 22, s. 35, and as to change of the place of worship: see 6 & 7 Wm. 4, c. 85, s. 19.

<sup>(2)</sup> 6 & 7 Wm. 4, c. 85, s. 3.

<sup>(3)</sup> 19 & 20 Vict. c. 119, s. 3, and Schedule A.; and where the parties are Irish or Scotch: see *ibid.* ss. 7 and 8.

<sup>(4)</sup> *Patrickson v. Patrickson*, 1 P. & D. 86.

<sup>(5)</sup> The Marriage Acts now usually to be observed, are:—

1533-4.—25 Hen. 8, c. 21 (Special Licences).

1811.—51 Geo. 3, c. 37 (Lunatics).

1823.—4 Geo. 4, c. 76 (Church of England).

Domicile.

Assuming that a marriage has been duly solemnized, the first question that *may* arise upon its becoming the subject of inquiry in this Court is that of the husband's domicile. Usually the marriages investigated here are English, and hence no question arises upon this point; but, where they are not, the question of domicile may be of much importance, as it is requisite in order to give the Court jurisdiction, either that the matrimonial home of the parties should be in this country, or that they should be domiciled here <sup>(1)</sup>. Hence domicile is often the dominant question in relation to the marriage. Marriage being a civil contract, it is obvious that questions arising out of it *between the parties to it*, must be decided in a civil court. The civil *status* of the parties is governed by the law of their domicile. This law is of universal observance among civilised nations, and is the criterion established by law for the purpose of determining civil *status* <sup>(2)</sup>. It is advisable here to state what domicile is, and to distinguish between the various kinds of domicile.

A man's domicile is his "home—permanent home" <sup>(3)</sup>, his habitation in a place with the intention of remaining there for ever, unless some circumstance should occur to alter the intention <sup>(4)</sup>. Any apparent definition, such as a man's settled habitation, or the like, will always terminate in the ambiguity

1823.—4 Geo. 4, c. 91 (Foreign Countries).

1824.—5 Geo. 4, c. 32 (Churches under repair, &c.).

1833.—11 Geo. 4, and 1 Wm. 4, c. 18 (*Idem*).

1835.—5 & 6 Wm. 4, c. 54 (Prohibited degrees).

1836.—6 & 7 Wm. 4, c. 85 (Solemnization).

1837.—7 Wm. 4, and 1 Vict. c. 22 (*Idem*).

1840.—3 & 4 Vict. c. 72 (*Idem*).

1847.—10 & 11 Vict. c. 98 (continued by Expiring Laws Continuance Act), s. 5 (Licence).

1849.—12 & 13 Vict. c. 68 (Foreign Countries).

1856.—19 & 20 Vict. c. 119 (Solemnization).

1857.—20 Vict. c. 19, s. 9 (Churches).

1857.—20 & 21 Vict. c. 85, ss. 2, 6, 57, 58 (Licences, Divorced Persons).

1860.—23 & 24 Vict. c. 18 (Quakers).

1860.—23 & 24 Vict. c. 24 (Churches).

1865.—28 & 29 Vict. c. 64 (Colonies).

1867.—30 & 31 Vict. c. 133, s. 12 (Churches).

1867-8.—31 & 32 Vict. c. 61 (Foreign Countries).

1867-8.—31 & 32 Vict. c. 77, s. 4 (Divorced Persons).

1869.—32 & 33 Vict. c. 68, s. 2 (Evidence in Actions of Breach of Promise of Marriage).

1870.—33 & 34 Vict. c. 97, s. 3, Sch. (Stamps).

1872.—35 & 36 Vict. c. 10 (Quakers).

1879.—42 & 43 Vict. c. 29 (Marriage on Her Majesty's ships).

1884.—47 & 48 Vict. c. 20 (Greek Marriages Act).

1886.—49 & 50 Vict. c. 3 (Validity).

1886.—49 & 50 Vict. c. 14 (Hours for Solemnization of Marriages).

1890.—53 & 54 Vict. c. 47 (Marriage Act, 1890), to amend the law with regard to marriages outside the United Kingdom between parties one of whom at least is a British subject (*ante*, p. 999).

<sup>(1)</sup> *Niboyet v. Niboyet*, 4 P. D. 1.

<sup>(2)</sup> *Udny v. Udny*, 1 Sc. App. 452 (1869).

<sup>(3)</sup> *Whicker v. Hume*, 4 Jur. (N.S.) 938 (Lord Cranworth).

<sup>(4)</sup> *Ibid.* Lord Wensleydale.

of the word "settled," or its equivalent, depending for their interpretation on the intention of the party, which must be collected from various *indicia* incapable of precise definition <sup>(1)</sup>. The law assigns as domicile to every person the country in which his settled residence is, and his civil *status* is regulated by the law of that country so long as he continues to reside there. When he quits it for another, then the country to which he goes, commonly called the country of his choice, becomes his domicile, if an intention to remain there can be proved <sup>(2)</sup>.

There are three kinds of domicile, viz. :—

Domicile of origin.

Domicile by law.

Domicile of choice.

Different  
kinds of  
domicile.

Domicile of origin is the domicile which the law gives to an individual on his birth, and it is his natural or involuntary domicile. Not until he becomes *sui juris*, i.e. reaches his majority, can he acquire a domicile of his own choosing <sup>(3)</sup>.

The place where he is born is not necessarily his domicile. He may be born at Paris while his parents are *en route* for a distant country. In such case the place of birth being accidental does not affect his domicile, and it follows that of his father <sup>(4)</sup>.

Domicile of origin continues until changed. A person *sui juris* had not acquired a fresh domicile on his majority, though he had quitted his domicile of origin while still a minor. On his death he was held to have retained his domicile of origin <sup>(5)</sup>. A man's domicile of origin may be put an end to by the law on sentence of death, but it cannot be *destroyed* by the will of the party <sup>(6)</sup>. By this is meant, that it can be changed and become dormant on the change, but it will revive if the domicile of choice by the change lapse, and no new domicile is acquired by law.

Domicile by law is that of wives and minors <sup>(7)</sup>. In most cases the husband's domicile becomes that of the wife. The husband's actual, and the wife's legal, domicile are, *primâ facie*, wherever the husband may be resident <sup>(8)</sup>.

The wife may of course live in a country different from that

(1) *Forbes v. Forbes*, 1 Kay, 352.

(5) *Patten*, 6 Jur. (N.S.) 151.

(2) *Bell v. Kennedy*, 1 Sc. App. 320 (Westbury, L.C.).

(6) *Udny v. Udny*, *ubi supra*.

(3) See *Udny v. Udny*, 1 Sc. App. 457, and *Forbes v. Forbes*, 1 Kay, 352.

(7) *Phillimore on Domicil*, 27.

(8) See *Geils v. Geils*, 1 Macq. 255 (1852); *Warrender v. Warrender*, 9 Bligh. 103 (1834).

(4) *Udny v. Udny*, 1 Sc. App. 458.

of her husband's domicile with his consent, but in so doing she will not acquire a different domicile from his <sup>(1)</sup>. No separation *de facto* will change her domicile, much less residence elsewhere with his consent <sup>(2)</sup>.

Effect of  
deed of  
separation.

A deed of separation will not enable the wife to acquire a separate domicile <sup>(3)</sup>.

It is a presumption of law that the wife is domiciled where the husband is domiciled, but this presumption failed in a case of divorce *a mensâ et thoro*, the equivalent of a judicial separation <sup>(4)</sup>.

The wife's  
domicile  
on her  
husband's  
death.

The wife retains her husband's domicile after his death, unless and until she changes it. But if she marries again her domicile becomes that of her second husband.

Infants and  
minors.

The domicile of infants or minors cannot be changed by their own act <sup>(5)</sup>.

No domicile can be acquired until the person is *sui juris* <sup>(6)</sup>. Hence the domicile acquired by a mother who survives the father becomes that of her minor children.

Unsound-  
ness of  
mind.

When a minor of unsound mind retains his unsoundness of mind after majority, his domicile remains what it was before his majority <sup>(7)</sup>.

Domicile  
of choice.

The domicile of origin clings to a man not only until he has acquired another, but until he has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile <sup>(8)</sup>.

He may have the strongest intention of abandoning his former domicile, and he may actually abandon it, but until he has acquired another the previous one is not displaced <sup>(9)</sup>.

To constitute domicile of choice two things are necessary: *factum et animus*, residence and intention to make it the home of the party <sup>(10)</sup>.

Residence abroad *under compulsion* will not create a change of domicile <sup>(11)</sup>.

The residence must be freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or relief from illness <sup>(12)</sup>.

<sup>(1)</sup> *Dolphin v. Robins*, 3 Macq. 584.

<sup>(2)</sup> See *Warrender v. Warrender*, 9 Bligh. 104.

<sup>(3)</sup> *Dolphin v. Robins*, 3 Macq. 563.

<sup>(4)</sup> *Williams v. Dormer*, 2 Rob. 508 (1852).

<sup>(5)</sup> *Forbes v. Forbes*, 1 Kay, 353.

<sup>(6)</sup> *Somerville v. Somerville*, 5 Ves. 787.

<sup>(7)</sup> *Sharpe v. Crispin*, 1 P. & D. 618.

<sup>(8)</sup> *Somerville v. Somerville*, 5 Ves. 786; *Crookenden v. Fuller*, 29 L. J. P. M. & A. p. 1.

<sup>(9)</sup> *Forbes v. Forbes*, 1 Kay, 354.

<sup>(10)</sup> *Lord v. Colvin*, 28 L. J. Ch. 365; *In re Capdevielle*, 33 L. J. Exch. 306.

<sup>(11)</sup> *Orleans*, 1 Sw. & Tr. 253.

<sup>(12)</sup> *Udny v. Udny*, 1 Sc. App. 458.

A man having acquired a domicile of choice may abandon it without being compelled to acquire a new domicile of choice; when he has abandoned one, and not acquired another, his domicile of origin will revert <sup>(1)</sup>.

Domicile  
of choice,  
how ended.

A person quitting one domicile of choice for another, and dying *in itinere* to that other, would retain his first domicile of choice <sup>(2)</sup>.

Death *in  
itinere*.

In a case decided by the Court of Appeal in 1887, when the subject was much considered, the law was summed up as follows: "The domicile of origin clings to a man unless he has acquired a domicile of choice by residence in another place with an intention of making it his permanent place of residence. If a man loses his domicile of choice, then, without anything more, his domicile of origin revives; but, in my opinion, in order to lose the domicile of choice once acquired, it is not only necessary that a man should be dissatisfied with his domicile of choice, and form an intention to leave it, but he must have left it, with the intention of leaving it permanently. Unless he has done that, unless he has left it both *animo et facto*, the domicile of choice remains. It may be lost *animo et facto*, and if lost, then the domicile of origin, there being no other domicile, revives and attaches again" <sup>(3)</sup>. Thus in a case where a man had sent letters in which he spoke of returning to England, and spending his declining years in peace and plenty, and of building up his hopes on being able to return to England in four or five years, the President considered that he had strongly indicated the *animus revertendi* <sup>(4)</sup>.

Domicile.

The law as to domicile in its relation to matrimonial matters was much considered in a case which came before the President in 1880 <sup>(5)</sup>, in which it was decided that the English Divorce Court will recognise the validity of the decree of a Scotch Court dissolving the marriage of domiciled Scotch persons, and that although the marriage was celebrated in England, and the woman was English, prior to her marriage.

The argument, said the President, which has been addressed to me, amounts to this: that because the marriage was celebrated in England, it was indissoluble in Scotland, or indissoluble except for some cause for which it could have been dissolved in England. But it must be remembered, that for the purposes now under consideration, a Scotchman is in precisely the same

<sup>(1)</sup> *King v. Foxwell*, 3 Ch. D. 521.

*field*, 36 Ch. D. 400, 407.

<sup>(2)</sup> *Bell v. Kennedy*, 1 Sc. App. 307.

<sup>(4)</sup> *Briggs v. Briggs*, 5 P. D. 163, 164.

<sup>(3)</sup> *Re Marrett. Chambers v. Wing-*

<sup>(5)</sup> *Harvey v. Furnie*, 5 P. D. 153.

Domicile position as any foreigner, and although when he comes into this country without changing his domicile, he is bound to pay obedience to the English law, and amongst other things, can only contract a marriage here in accordance with its requirements; yet from the moment that he leaves this country and goes back to his own, he owes no further allegiance to the English law, and from that time forward his rights, and duties, and *status* can only be regulated by the law of the country of his domicile so long as he remains there.

The President then pointed out that though the marriage was with an English woman, that had no bearing upon the question, because it was not a mere fiction, but a literal and absolute fact that a wife acquired the domicile of her husband, and accordingly when both parties returned to Scotland they took with them, so to speak, their *status* of married persons, and entirely withdrew themselves from the English jurisdiction; they took with them everything connected with the marriage, except the superfluous evidence of the parish register, and from that time forth while the man remained in Scotland, the place of his domicile, English law had nothing whatever to do with him. The Scotch Court, therefore, was possessed of the entire subject with which it had to deal.

The decision in this case was affirmed both by the Court of Appeal <sup>(1)</sup> and by the House of Lords in 1882. In delivering judgment thereon, Lord Selborne said: "When the parties become husband and wife, what is the character which the wife assumes? She becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicile than his, which she acquires. The marriage is contracted with a view to that matrimonial domicile which results from her placing herself by contract in the relation of wife to her husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad. Therefore it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law, subject to it in respect of the consequences of the matrimonial relation, and all other consequences depending upon the law of the husband's domicile" <sup>(2)</sup>.

The student will now be enabled to apply the law of domicile to cases in which that question arises. The next step in our

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<sup>(1)</sup> 6 P. D. 35.

<sup>(2)</sup> Per Selborne, L.C., in *Harvey v. Farnie*, 8 App. Cas. 43.



inquiry relates to jurisdiction of the Court in matrimonial matters; and here it will be desirable to direct the reader's attention to the following list of the Statutes concerning matrimonial causes and matters connected therewith:—

Statutes  
relating to  
matrimon-  
ial causes  
and mat-  
ters.

Matrimonial Causes Act, 20 & 21 Vict. c. 85, establishing Court for divorce and matrimonial causes (28th Aug. 1857).

Legitimacy Declaration Act, 1858, 21 & 22 Vict. c. 93 (2nd Aug. 1858).

Matrimonial Causes Amendment Act, 21 & 22 Vict. c. 108 (2nd Aug. 1858).

Matrimonial Causes Amendment Act, 22 & 23 Vict. c. 61 (13th Aug. 1859).

Matrimonial Causes Amendment Act, 23 & 24 Vict. c. 144 (28th Aug. 1860).

Matrimonial Causes Perpetuating Act, 25 & 26 Vict. c. 81 (7th Aug. 1862).

Matrimonial Causes Amendment Act, 27 & 28 Vict. c. 44 (July, 1864).

Matrimonial Causes Amendment Act, 29 Vict. c. 32 (June, 1866).

Matrimonial Causes Amendment Act, 31 & 32 Vict. c. 77 (31st July, 1868).

Matrimonial Causes Amendment (Evidence) Act, 32 & 33 Vict. c. 68 (9th Aug. 1869).

Matrimonial Causes Amendment Act, 36 Vict. c. 31 (16th June, 1873).

Matrimonial Causes Amendment Act, 41 Vict. c. 19 (27th May, 1878).

Matrimonial Causes Amendment Act, 47 & 48 Vict. c. 68 (Aug. 1884).

Greek Marriages Act, 47 & 48 Vict. c. 20 (1884).

The Guardianship of Infants Act, 1886, 49 & 50 Vict. c. 27 (25th June, 1886), *ante*, p. 609.

The Marriage Act, 1890, 53 & 54 Vict. c. 47 (*ante*, p. 999).

## CHAPTER II.

PRIMARY AND SECONDARY JURISDICTION OF THE PROBATE, DIVORCE,  
AND ADMIRALTY DIVISION.

Primary  
and second-  
ary juris-  
diction.

The jurisdiction of the Probate, Divorce, and Admiralty Division in respect of matrimonial business is either primary or secondary.

The *primary* jurisdiction of the Probate, Divorce and Admiralty Division relates to the following classes of business :—

1. Dissolution of marriage or divorce.
2. Nullity of marriage.
3. Judicial separation.
4. Restitution of conjugal rights.
5. (Practically obsolete) Jactitation of marriage.
6. Applications under the Legitimacy Declaration Act, 1858, 21 & 22 Vict. c. 93.

The Court has also a *secondary* jurisdiction as subsidiary and incidental to its primary jurisdiction in respect of—

1. Alimony <sup>(1)</sup>.
2. Custody of and access to the children of the marriage <sup>(2)</sup>.
3. The application of damages recovered from adulterers <sup>(3)</sup>.
4. Settlements of property of the parties <sup>(4)</sup>.
5. Protection of the wife's property <sup>(5)</sup>.
6. Reversals of decrees of judicial separation, decrees *nisi* for divorce, and decrees of nullity of marriage <sup>(6)</sup>.

In addition to these matters the Court has also, in addition to its concurrent jurisdiction (under the Judicature Act) as one of the Divisions of the High Court of Justice, a jurisdiction—

1. In respect of appeals from the decisions of justices under the Matrimonial Causes Act, 1878 (*post*, p. 1024).
2. To enforce payment of alimony, &c., under the Debtors Act of 1869 (Rule 180 A).

(1) 20 & 21 Vict. c. 85, ss. 17, 24, 32; 29 & 30 Vict. c. 32, ss. 1, 2.

(2) 20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4.

(3) 20 & 21 Vict. c. 85, s. 33.

(4) 20 & 21 Vict. c. 85, s. 45;

22 & 23 Vict. c. 61, s. 5.

(5) 20 & 21 Vict. c. 85, ss. 21, 25; 21 & 22 Vict. c. 108, ss. 6, 7.

(6) 20 & 21 Vict. c. 85, s. 23; 23 & 24 Vict. c. 144, s. 7; 36 Vict. c. 31, s. 1.

The Court also disposes incidentally of all motions and petitions incidental to the suits and matters which have been here enumerated.

We shall now proceed to consider the business of the Divorce Court under the two main divisions of its primary and secondary jurisdiction.

## CHAPTER III.

### PRIMARY JURISDICTION.

#### I. DISSOLUTION OF MARRIAGE.

The hus-  
band's  
grounds.  
The wife's  
grounds.

The grounds upon which husband and wife respectively can claim to have a marriage dissolved are widely different.

A husband can obtain a divorce on the ground of adultery by his wife, and on no other ground.

A wife may obtain a divorce on any of the following grounds: (1) incestuous adultery; (2) bigamy with adultery; (3) rape; (4) sodomy or bestiality; (5) adultery and cruelty; or (6) adultery and desertion <sup>(1)</sup>.

Some of the offences here mentioned are defined by the Divorce Act itself, while some of the others have been repeatedly made the subject of judicial definition: "Incestuous adultery" is defined, for the purposes of the Act, to mean "adultery committed by a husband with a woman with whom if his wife were dead he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity." Bigamy is in like manner defined to mean "marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere." For the definitions of the other matrimonial offences which stand in need of definition for the purposes of the law of divorce, we are obliged to have recourse to the decisions of which there is no lack in the volumes of reported cases on the subject.

"Legal  
cruelty."

What is cruelty, *i.e.* "legal cruelty" within the meaning of the Divorce Act? It is for the Court to direct the jury what acts constitute legal cruelty, and then for the jury to find whether the acts done amount to cruelty. The Court will not interfere unless there is actual personal ill-treatment or such threats as would reasonably excite in a mind of ordinary firmness a fear of personal injury.

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<sup>(1)</sup> Non-compliance with a decree a husband now amounts to desertion:  
for restitution of conjugal rights by 47 & 48 Vict. c. 68 (*post*, p. 1013).

Words of menace which raise a reasonable apprehension of violence, and excite such terror as to make life intolerable, constitute legal cruelty, but not mere abuse or insult. Hard words, said an eminent judge, break no bones, and it is only in cases of danger to the health, life, or person of the party that these Courts interfere. . . .

The Court has a solemn duty to perform; it must not suffer family quarrels to be made a sufficient ground for a divorce by reason of cruelty between parties who have contracted to live together for better or worse.

Cruelty consists of conduct dangerous to life, limb, or health, or such as to cause an apprehension that it will be dangerous, inflicted upon either party to the marriage by the other <sup>(1)</sup>. It has been considered difficult and hardly safe to define it affirmatively with precision. It can only be described generally, and rather by effects produced than by acts done <sup>(2)</sup>. It is almost impossible, having regard to recent decisions, to define it so as to cover acts of conduct which have been held to constitute legal cruelty. Cruelty.

There is cruelty if there be either actual injury or such a threatening of injury either by word or deed as to create a real apprehension of bodily danger or injury to the health <sup>(3)</sup>.

There is also cruelty if there be conduct of such a character as to preclude the possibility of the performance of the duties of married life and to render cohabitation unsafe. If there is danger of violence it must be averted, and the mischief prevented <sup>(4)</sup>. Further, one act of cruelty aggravated in character and such as to create fear of repetition suffices <sup>(5)</sup>.

Moral force so exercised upon a wife as to injure her health and cause imminent danger of a serious illness is cruelty in law <sup>(6)</sup>. Constant threats and insulting a wife's moral feelings by indecent abuse in public where injury to health will follow from the indignity have been stigmatised as "the grossest and most abominable cruelty" <sup>(7)</sup>. There is also authority for stating that cruelty to children in their mother's presence may become cruelty to her if her sensibility is shocked by it <sup>(8)</sup>.

<sup>(1)</sup> *Westmeath v. Westmeath*, 2 Hagg. E. R. Supp. 55; *Evans v. Evans*, 1 Hagg. C. C. 39.

<sup>(2)</sup> *Westmeath v. Westmeath*, *ubi supra*.

<sup>(3)</sup> *Kelly v. Kelly*, 22 L. T. (N.S.) 309; *Tomkins v. Tomkins*, 1 Sw. 163.

<sup>(4)</sup> *Waring v. Waring*, 2 Cons. 154.

<sup>(5)</sup> *Popkins v. Popkins*, 1 Hagg. E. R. 768.

<sup>(6)</sup> *Kelly v. Kelly*, 2 P. & D. 31; 21 L. T. (N.S.) 564.

<sup>(7)</sup> *Milner v. Milner*, 31 L. J. (Mat.) 159.

<sup>(8)</sup> *Dysart v. Dysart*, 3 N. C. 347; *Suggate v. Suggate*, 28 L. J. (Mat.) 46. The wilful communication of venereal disease is cruelty: *Brown v. Brown*, 1 P. & D. 46; *Boardman v. Boardman*, 1 P. & D. 233.

## Cruelty.

In a case decided in 1886, where the petition was for a decree of judicial separation, on the ground of her husband's cruelty, the petitioner in her evidence stated that the cruelty which commenced during the honeymoon, consisted of harsh and irritating language and tyrannical conduct, which made her life intolerable, and seriously injured her health. There was no actual violence, but the husband had shaken his fist in his wife's face, saying at the same time that being a lawyer he knew the law too well to commit actual violence <sup>(1)</sup>. The parties had been married in the year 1876, and lived together till the year 1880, when the wife, acting on medical advice, left the husband in consequence of his ill-treatment. The Court decided that what the law recognised as "cruelty" had been perpetrated by the husband, and that there were such further acts of violence as to prevent the husband from setting up condonation from the fact of the wife having subsequently lived with him <sup>(2)</sup>.

Desertion such as to entitle a matrimonial suitor to the relief mentioned in the Divorce Acts arises in two ways—desertion "without cause," and desertion "without reasonable excuse," but in each case they signify the same thing <sup>(3)</sup>.

## Desertion.

Desertion in the abstract is "to forsake or abandon" <sup>(4)</sup>. But to decide what amounts to a forsaking or abandonment is often a point of great nicety. It is leaving a wife destitute <sup>(5)</sup>. To leave her merely will not suffice, because a sailor <sup>(6)</sup> or a soldier <sup>(7)</sup> may be ordered away on duty and leave his wife behind. Indeed this is often done with her consent. But if a wife be left by her husband without means of living he is guilty of desertion <sup>(8)</sup>, provided he has left her wilfully, and against her wish, she not being a consenting party <sup>(9)</sup>. Mere discontinuance of cohabitation is manifestly insufficient from the above observations. But advantage may be taken of temporary absence or separation to hold aloof from a renewal of inter-

<sup>(1)</sup> *Mytton v. Mytton*, 11 P. D. 141. In this case it was said, "If the conduct of the husband be such as to endanger the life, or even the health of the wife, that is cruelty in every sense of the word, whether we talk of legal cruelty or anything else."

<sup>(2)</sup> The subsequent acts of cruelty need not be exactly of the same extent as those which have been committed on earlier occasions: *Mytton v. Mytton*, 11 P. D. 144. Evidence of an act of actual violence is not admissible under a general allegation of cruelty: *Brook v. Brook*, 12 P. D. 19,

where the hearing was adjourned that particulars might be given.

<sup>(3)</sup> *Yeatman v. Yeatman*, 1 P. & D. 489.

<sup>(4)</sup> *Williams v. Williams*, 3 S. T. 548.

<sup>(5)</sup> *Haswell v. Haswell (et al.)* 29 L. J. (Mat.) 24.

<sup>(6)</sup> *Ex parte Aldridge*, 1 S. & T. 88.

<sup>(7)</sup> *Henty v. Henty*, 33 L. T. (N.S.) 263; 24 W. R. Dig. 91.

<sup>(8)</sup> See *Haswell v. Haswell, ubi supra*.  
<sup>(9)</sup> *Thomson v. Thomson*, 27 L. J. (Mat.) 65; *Graves v. Graves*, 33 L. J. (Mat.) 70.

course. This, if done wilfully and against the wish of the other party to the marriage, and in the carrying out of a prearranged plan, becomes desertion <sup>(1)</sup>. Desertion.

This holds good even though the absentee husband provides for the maintenance of his wife. She has a right, as his wife, to the protection of his name and the shelter of his home in cohabitation.

The denial of these rights is of course aggravated by the further denial of means of support, and, on the other hand, it is mitigated by a liberal allowance, but the wife's unwillingness to the husband's withdrawal from cohabitation renders it desertion irrespective of the question of support <sup>(2)</sup>.

In connection with the subject of desertion, attention may be here directed to one of the provisions of the Act to amend the law as to the restitution of conjugal rights in England (47 & 48 Vict. c. 68), which is to be cited as the Matrimonial Causes Act, 1884, and is more fully considered hereafter (p. 1025). By sect. 5 of that Act, non-compliance with a decree for restitution may be treated by the petitioner as desertion without reasonable cause, and he or she may at once sue for judicial separation on the ground of desertion, and where the husband has already been guilty of adultery the wife may sue for dissolution, and the decree, if pronounced, shall be an ordinary decree *nisi*.

In a recent case where the desertion fell short of the required period of two years by several months, the case was adjourned, and twelve months after a supplemental petition having been presented shewing the necessary period of desertion, a decree *nisi* was pronounced <sup>(3)</sup>.

An Act which was passed in 1886, and which is to be cited by the somewhat singular title of the "Married Women's (Maintenance in case of Desertion) Act, 1886" <sup>(4)</sup>, provides that any married woman, who shall have been deserted by her husband, may summon her husband before any two justices in petty

(1) *Fitzgerald v. Fitzgerald*, 1 P. & D. 698; *Drew v. Drew*, 13 P. D. 97.

(2) *Yeatman v. Yeatman*, 1 P. & D. 489.

(3) *Wood v. Wood* (No. 2), 13 P. D. 22; see also: *Farmer v. Farmer*, 9 P. D. 245; *Harding v. Harding*, 11 P. D. 111; *Garcia v. Garcia*, 13 P. D. 216; *Lapington v. Lapington*, 11 P. D. 21; *Smith v. Smith*, 58 L. T. (N.S.) 639; *Lodge v. Lodge*, 15 P. D. 159. In this case the Court decided that as there was no proof that certain offers to return to cohabitation,

which were made by the husband, were not *bonâ fide*, the wife could not treat a separation as desertion. "If it appeared," said the judge in this case, "that the husband's offer to return to cohabitation was not *bonâ fide*, it would not bar the wife's remedy, but the *onus* of shewing it lies with the petitioner."

(4) Married Women's (Maintenance in case of Desertion) Act, 1886 (49 & 50 Vict. c. 52). See s. 2 as to practice, and see *Pape v. Pape*, 20 Q. B. D. 76.

Married  
Women's  
(Mainten-  
ance in  
case of  
Desertion)  
Act.

sessions or any stipendiary magistrate, and thereupon such justices or magistrate, if satisfied that the husband being able wholly or in part to maintain his wife, or his wife and family, has wilfully refused or neglected so to do, and has deserted his wife, may order :

(1.) That the husband shall pay to his wife such weekly sum not exceeding two pounds, as the justices or magistrate may consider to be in accordance with his means and with any means the wife may have for her support and the support of her family. The payment of any sum so ordered is enforceable against the husband in the same manner as the payment of money is enforced under an affiliation order; and the justices or magistrate by whom any such order has been made, or other justices or magistrate sitting in their or his stead, have power from time to time to vary the same, on the application of either the husband or wife, upon proof that the means of the husband or wife have been altered.

The Act contains a provision that no order for payment of any such sum by the husband shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned, and that any order for payment of any such sum may be discharged by the justices or magistrate by whom such order was made, or other justices or magistrate sitting in their or his stead, upon proof that the wife has since the making thereof been guilty of adultery.

Bars abso-  
lute and  
discre-  
tionary.

There are certain bars to a petitioner's relief, and these are given in the Divorce Act of 1857, sects. 30 and 31. Some of these are called "absolute bars," because on proof of them the Act declares that the Court "shall dismiss the petition." Other defences there are which are called "discretionary bars," because if they are proved the Court may still exercise its discretion as to whether it shall pronounce a decree or not.

The absolute defences or "bars" are as follows :—

1. Disproof of adultery.
2. Connivance.
3. Condonation.
4. Collusion in presenting the petition.

The discretionary defences or "bars" are as follows :—

1. The petitioner's adultery.
2. Unreasonable delay in presenting or prosecuting the petition.
3. Cruelty to the other party to the marriage.
4. Desertion or wilful separation from the other party before the adultery complained of, and without reasonable excuse.



5. Such wilful neglect or misconduct as has conduced to the adultery complained of.

#### ABSOLUTE BARS.

1. The first absolute bar is a denial of the facts alleged in the petition. Denial of  
alleged  
facts.

Failure on the part of the petitioner to prove the respondent's adultery, or disproof of the charge against her by the respondent, will be a complete defence to a petition for dissolution. The burden of proof falls upon the petitioner, and accordingly when the allegations in the petition are denied, it is not necessary to support the denial, unless counter-charges are made with an affidavit, the reason being that it is not for the respondent to disprove, but for the petitioner to prove, the facts alleged <sup>(1)</sup>.

2. The second absolute bar is connivance. Connivance. With regard to connivance, the law proceeds upon the principle *volenti non fit injuria* <sup>(2)</sup>. Connivance is the acquiescence of a husband in an adulterous intercourse on the part of his wife by wilfully abstaining from measures to prevent it when he cannot but believe or suspect as a reasonable man that it is likely to occur if he does not prevent it <sup>(3)</sup>. The result of the decisions it was said in one case is that there must be "a willing mind." There must be knowledge and acquiescence.

The word "conniving," it has been said, is not to be limited to the meaning of wilfully refusing, or affecting not to see or become acquainted with that which you know or believe is happening or about to happen. It must include the case of a husband acquiescing in, by wilfully abstaining from taking any steps to prevent, that adulterous intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur. It is a figurative expression, meaning a voluntary blindness to some present act or conduct, to something going on before the eyes, and is inapplicable to anything past or future <sup>(3)</sup>.

A singular illustration of the doctrine of connivance is afforded by a case in which an English husband and wife were divorced by an American Court at the wife's suit. The husband married again in America. The divorced wife then sued for divorce in England, charging the husband with adultery on the ground

<sup>(1)</sup> Dixon, Divorce, p. 180.

<sup>(3)</sup> *Gipps v. Gipps & Hume*, 33

<sup>(2)</sup> See *Boulting v. Boulting*, 3 L. J. 161; 11 H. L. 1.

Sw. & Tr. 335.

of his cohabitation with his American wife, but she was in the opinion of the Court on the horns of a dilemma. The American decree was either valid or invalid. If valid, the parties were at full liberty to marry again, and the respondent had not committed adultery by living with the woman he married. If, on the other hand, the American decree could not be recognised in the English Court as valid, as it was obtained at her instance she had no right to complain of the consequences as she had practically connived at her husband's adultery. Her petition was accordingly dismissed <sup>(1)</sup>.

Condonation.

3. The next absolute bar is condonation. It is an effacing of the offence of the other party to the marriage so as to restore him or her to the position he or she occupied before the offence was committed. "Words however strong can at the highest only be regarded as imperfect forgiveness, and unless followed by something which amounts to a reconciliation and to a reinstatement of the wife in the condition she was in before the transgression, it must remain incomplete" <sup>(2)</sup>. Condonation is forgiveness upon the condition that no matrimonial offences shall be committed in the future. If the respondent can prove condonation, then it acts as an absolute bar to the petitioner's remedy. To found it there must be a complete knowledge of all the adultery or the cruelty, or whatever the offence relied on, and a condonation or forgiveness. The difficulty in these cases is not in applying this simple and very intelligible principle of law, but in arriving at the facts of the case. Condonation by the wife may occur more than once, but if she be weary of forgiving her husband, and at last on the repeated commission of the offence charged declines to do so, her condonation is at an end <sup>(3)</sup>. Repeated condonations may prejudice if not defeat the right to obtain a decree <sup>(4)</sup>. It should be borne in mind that the rule of condonation is held more laxly against the wife than the husband. The ground on which the law here proceeds is that not only is the wife more under power than the husband, but that that forgiveness which would be degrading and dishonourable in the case of a husband may be excusable or even meritorious in the case of a wife <sup>(5)</sup>.

<sup>(1)</sup> *Palmer v. Palmer*, 29 L. J. (Mat.) 27; see also on the subject of connivance: *Studdy v. Studdy*, 28 L. J. (P. & M.) 44; *Ross v. Ross*, 1 P. & D. 734; *Gower v. Gower*, 2 P. & D. 432.

<sup>(2)</sup> *Keats v. Keats and Monteyman*, 28 L. J. (Mat.) 57

<sup>(3)</sup> See *Beeby v. Beeby*, 1 Hagg. E. R. 795.

<sup>(4)</sup> *Westmeath v. Westmeath*, 2 Hagg. Sup. 113; see also *Story v. Story and O'Connor*, 12 P. D. 196; and *Mytton v. Mytton*, 11 P. D. 141.

<sup>(5)</sup> *D'Aquilar v. D'Aquilar*, 1 Hagg. E. R. 786; and see Dixon on Divorce.

In connection with the subject of condonation, it must be borne in mind that an offence, though condoned, may be revived by subsequent misconduct. Thus adultery condoned may be revived by subsequent adultery or cruelty, and subsequent adultery may work a revival of condoned desertion.

4. The last absolute bar is collusion, and it may be observed here that it is almost invariably put into force by the Queen's Proctor's intervention after the decree *nisi*, and pending its being made absolute. Collusion.

Collusion has been well defined as the permitting a false case to be substantiated, or keeping back a just defence. It is an agreement between the petitioner and respondent, that facts which are relevant to the case before the Court, and which consequently should be before the Court at the hearing of the suit, shall be suppressed, as when a wife agrees not to make charges against the husband which she believes to be true, and which if proved would influence the Court to withhold its decree (1). These charges, if founded on fact, sometimes reach the ear of the Queen's Proctor after the petitioner's decree, and he has then a duty cast upon him, as a public officer, of defeating it by proving them.

The law with regard to collusion was much considered in a case which came before the Court of Appeal in 1890 (2). In that case the law on the subject was summed up as follows: "The wife is not to be deprived of the decree, simply and only in case it is found that she has during the marriage been guilty of adultery, but the Court is prevented from making a decree in her favour if it has been found that the petitioner has, during the marriage, been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents." That is, "collusion" will deprive a petitioner of a decree, independently of the question whether or not the Court finds that the petitioner has been guilty of a matrimonial offence. In either case the Act of Parliament prevents the Court from making a decree.

"It is very important that in every case brought before the Court the proceedings shall be fairly and properly taken, that all judgments shall be fairly obtained, and that the Court shall refuse to make a decree not only and merely where it finds that

(1) *Hunt v. Hunt*, 47 L. J. (Mat.) 39; 39 L. T. (N.S.) 45.

(2) *Butler v. Butler*. *Butler v. Butler and Burnham* (Queen's Proc-

tor intervening), 15 P. D. 66, 71, *et seq.*, where *Alexandre v. Alexandre*, 2 P. & D. 164, was considered.

the facts suppressed might lead to the conclusion that a matrimonial offence has been committed, but also where it finds that the parties by an agreement between them have prevented material facts from being brought before the Court. Here, by agreement between the parties, the matter was not fully brought before the Court, and that is collusion. It is not necessary that the petition should be presented in collusion; it is enough *if it is either presented or prosecuted in collusion.*"

An agreement between the parties to a divorce suit to withhold from the Court pertinent and material facts which might have been adduced on the trial in evidence in support of a counter charge against the respondent or co-respondent amounts to collusion, even though the suppressed facts might not have been sufficient to have established the counter charge.

The object of the law is to compel the parties to come into the Court of Divorce with clean hands. It is to oblige them to bring all material and pertinent facts to the notice of the Court to prevent their blinding the eyes of the Court in any respect; to oblige them so to act as to enable the Court to be in a position to do justice between the parties.

#### DISCRETIONARY BARS.

Petitioner's  
adultery.

1. The petitioner's adultery does not give rise to the exercise of the Court's discretion unless there are extenuating circumstances in the party's favour who committed it. When there are such circumstances, the Court will exercise its discretion, but in their absence, this offence is an effectual bar to the party's relief<sup>(1)</sup>.

Ignorance  
of facts.

In a case where a petitioner thought his wife was dead and married again, he afterwards discovered that she was living, and living in adultery. He sued for a divorce. She counter-charged adultery. The Court treated his second marriage as having been entered into in ignorance of the fact that his wife was still alive, and in its discretion granted him a decree<sup>(2)</sup>.

Ignorance  
of law.

In another case, a husband married again after obtaining a decree *nisi*, under the impression that it was a final dissolution of his marriage. As this mistake was through ignorance of the law,

(1) *Morgan v. Morgan*, 1 P. & D. 644. The cases in which the discretion will be exercised in favour of the petitioner, are divided in Browne and Powles on Divorce, 5th ed. p. 86, into three classes: (1) Where the adultery is committed in ignorance of fact or law; (2) where it is com-

mitted in consequence of violence or threats; and (3) when committed with the knowledge of the respondent, and condoned.

(2) *Morgan v. Morgan*, 29 L. J. (Mat.) 21; *Joseph v. Joseph and Another*, 34 L. J. 96.

the Court thought fit to exercise its discretion and grant him a decree<sup>(1)</sup>. In a third case, where a wife was compelled by her husband to lead a life of prostitution. She afterwards sued for a divorce on the ground of his adultery, and the Court treated her adultery as committed under compulsion and gave her a decree<sup>(2)</sup>.

2. This delay is such as to make the petitioner seem insensible to the loss of his wife, and is in some degree almost equivalent to condonation<sup>(3)</sup>. Whether it is unreasonable or not is purely a question of fact to be decided upon evidence. Unreasonable delay.

In one case a husband knew of his wife's adultery for fourteen years. During that time, though perhaps too poor at first, he saved means to go to the Court, but did not do so. When he did his suit was rejected<sup>(4)</sup>. In another case brought where an impecunious husband, doubtful of his wife's guilt, delayed proceedings till he was sure of it, the Court considered that the delay was reasonable<sup>(5)</sup>.

Lack of means to proceed earlier, is a full explanation of delay though the interval be a long one<sup>(6)</sup>. A desire to avoid public exposure and spare a mother's feelings has also been held sufficient<sup>(7)</sup>.

3. Cruelty, is such cruelty on the part of the petitioner as would, if proved against the respondent, entitle the Court to act upon it in the petitioner's favour. For a description of legal cruelty, see *ante*, p. 1011. Cruelty.

4. Desertion, or wilful separation from the other party before the adultery complained of, without reasonable excuse<sup>(8)</sup>. Desertion or wilful separation.

Desertion has already been explained (*ante*, p. 1012), and reasonable excuse for wilful separation is such misconduct as would entitle the petitioner to sue upon it.

Less criminal conduct, however, may suffice<sup>(9)</sup>. Cases of this description fall peculiarly within the discretion of the Court.

5. The last discretionary bar is, in the language of the Divorce Act, "Such wilful neglect or misconduct as has conduced to the adultery."

Neglect of this kind arises when the petitioner knew of the Wilful neglect or misconduct.

(1) *Noble v. Noble, et al.*, 1 P. & D. 691.

(2) *Coleman v. Coleman*, L. R. 1 P. & D. 81.

(3) *Pallew v. Pallew, et al.*, 29 L. J. (Mat.) 44; 1 Sw. & Tr. 555.

(4) *Short v. Short, et al.*, 3 P. & D. 193.

(5) *Wilson v. Wilson*, 2 P. & D. 441.

(6) *Harrison v. Harrison*, 33 L. J. (Mat.) 44.

(7) *Newman v. Newman*, 2 P. & D. 58. See also *Heaviside v. Dixon*, 12 Cl. & F. 334.

(8) See *Heyes v. Heyes*, 13 P. D. 11; 36 W. R. 527.

(9) *Haswell v. Haswell, et al.*, 29 L. J. (Mat.) 21; *Yeatman v. Yeatman*, L. R. 1 P. & D. 494.

danger to his wife's honour and virtue, and purposely, or recklessly disregarded it <sup>(1)</sup>.

Wilful  
neglect or  
misconduct.

Conduct conducing to any particular act of adultery, after adultery has once been committed, will not defeat a petitioner's case; but conduct which could be considered by the Court as having brought about the original adultery, would call for the exercise of the Court's discretion <sup>(2)</sup>.

The law on this subject has been summed up as follows:—

“The legislature does not mean that a husband shall be deprived of his remedy, whenever it can be proved that some conduct on his part has conduced to any particular act of adultery, after an adulterous intercourse has once been established; but it means that his remedy shall be withheld from him if he has so acted as to bring about that intercourse. That is a most important distinction. It may very well happen that a husband may be perfectly blameless as to his wife's adultery in the first instance; but, that after she has established an adulterous intercourse she and her paramour, acting together for the purpose of blinding the husband, and throwing as much dust in his eyes as possible, may carry on their intimacy in such a way that he may not perceive it, and it may be that, blinded by them, his conduct may appear more or less neglectful. It seems to me that the neglect intended by the legislature is neglect conducing to the woman's fall, and not neglect conducing to any particular act of adultery subsequent to her fall” <sup>(3)</sup>.

Decree *nisi*.

When upon the hearing of the petition (*post*, p. 1040), the injured party shews to the satisfaction of the Court that he or she is entitled to a decree for dissolution of the marriage upon one or other of the foregoing grounds, the Court, in the first instance, makes a “decree *nisi*” for such dissolution. At the end of six months from the decree *nisi* the petitioner is entitled to have the decree made absolute, unless the Queen's Proctor intervenes upon the ground that there was or now is an absolute or discretionary “bar” which has not been brought before the Court. If such bar is proved by the Queen's Proctor, the Court rescinds the decree *nisi* and dismisses the original petition. If the Queen's Proctor raises no opposition, or his intervention when made is unsuccessful, the decree is made absolute after six months from the decree *nisi* upon the

<sup>(1)</sup> *Dering v. Dering*, L. R. 1 1 P. & D. 744.  
P. & D. 531.

<sup>(2)</sup> *St. Paul v. St. Paul, et al.*, L. R.

<sup>(3)</sup> Per the Judge Ordinary in *St. Paul v. St. Paul*, 1 P. & D. 739.

application of the petitioner. Then and not until then the marriage is dissolved. Between the decree *nisi* and the decree absolute the parties remain man and wife in the eye of the law <sup>(1)</sup>.

Decree  
absolute.

(1) See as to intervention of Queen's Proctor: *Butler v. Butler*, 15 P. D. 32, 126. When the six months, the statutory interval of time, have passed after the decree *nisi*, the petitioner's solicitor should search the record in the case for proceedings in intervention or otherwise by the Queen's Proctor, and on finding none make and file an affidavit to that effect. The case is then called on in open Court on the next con-

venient motion day by the sitting registrar, and no objection being made the decree is pronounced absolute by the judge, and the marriage is finally dissolved. See as to Indian divorce: *Warter v. Warter* (No. 2), 15 P. D. 152; and as to circumstances under which the Court refused to dismiss petition for want of prosecution: *Southern v. Southern*, W. N. (1890) 80.

## CHAPTER IV.

*PRIMARY JURISDICTION OF THE PROBATE, DIVORCE  
AND ADMIRALTY (continued).*

## II. NULLITY OF MARRIAGE.

Suits for nullity of marriage are brought to have marriages declared void.

Marriages, says Mr. Dixon, are either (1) void *ab initio*; or (2) voidable at the option of the injured party.

Void marriages. Under the heads of marriages void *ab initio*, fall :—

- (1) Bigamous marriages;
- (2) Marriages void on the ground of insanity;
- (3) Marriages between persons within the prohibited degrees of consanguinity or affinity.

Voidable marriages. Under the head of voidable marriages, fall those which are voidable on the ground of :

- (1) Impotence;
- (2) Want of age.

Voidable marriages can only be annulled during the lifetime of the parties <sup>(1)</sup>.

“The courts of law have always refused to recognise as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract. True it is that in contracts of marriage there is an interest involved above and beyond that of the immediate parties. Public policy requires that marriages should not be lightly set aside, and there is in some cases the strongest temptation to the parties more immediately interested to act in collusion in obtaining a dissolution of the marriage tie. These reasons necessitate great care and circumspection on the part of the tribunal, but they in no wise alter the principle or the grounds on which this, like any other contract, may be avoided” <sup>(2)</sup>.

(1) *A. v. B.*, 1 P. & D. 559.

(2) Per judgment of Butt, J., in *Scott v. Sebright*, 12 P. D. 23.



In the case of *Durham v. Durham* <sup>(1)</sup> a petition was presented asking for a declaration of nullity of marriage on the ground that the wife was, at the time of the celebration of the ceremony, of unsound mind and incapable of contracting marriage. The Court in deciding the case proceeded on the principle that the burden of shewing that the respondent was insane at the time of the marriage lay upon the party asserting it. "Soundness of mind," the President said, "might be defined for the purposes of the question before the Court, as constituted by a capacity to understand the nature of the contract, and the duties and responsibilities which it created. A mere comprehension of the words of the promises exchanged," he continued, "is not sufficient. The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into. I am bound to take into consideration the fact that she has now become manifestly insane. I must look at the nature of that insanity, and form an opinion from the general history of the case, whether it is recent or sudden in its inception, or whether it has been of slow growth, and whether it had begun before the marriage and had by that time reached a stage which incapacitated the respondent from entering into the contract of marriage." Insanity.

### III. JUDICIAL SEPARATION.

This suit is the substitute provided by the Matrimonial Causes Act, 1857, for the old suit for divorce *a mensa et thoro*. It can be brought by either husband or wife on the ground of adultery, cruelty, desertion without cause for two years or upwards, or sodomitical practices. On proof of any of these matrimonial offences the petitioner is entitled in the absence of material matrimonial wrong on his or her part to a decree, but it was decided by the Court of Appeal that a wife guilty of adultery could not obtain a decree for judicial separation against a husband guilty of cruelty and adultery <sup>(2)</sup>.

As already stated, the wife's adultery entitles the husband to a dissolution, but he may prefer the smaller remedy, and still, upon a repetition of adultery, avail himself of the greater one. In practice this course is seldom taken.

(1) *Durham v. Durham*, 10 P. D. 80, where the previous authorities on the subject are cited.

(2) *Otway v. Otway*, 13 P. D. 141; and see also *Phillips v. Phillips*, 13

P. D. 220 (as to inquiry with regard to separate property); *Moore v. Moore*, 12 P. D. 193 (as to separation deed); *Lodge v. Lodge*, 15 P. D. 159 (question whether desertion or not).

Judicial  
separation.

With regard to judicial separation, the Matrimonial Causes Act, 1878 (41 Vict. c. 19) enacts that: If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of the statute, 24 & 25 Vict. c. 100, s. 4, upon his wife, the Court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband, and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty <sup>(1)</sup>.

It will be seen that either husband or wife may obtain a decree of judicial separation on the ground of cruelty, but still the Court regards cruelty as regards the two opposite sexes in a somewhat different way.

The law on this subject has been judicially stated as follows: "There is no doubt that for acts of personal violence a husband is as much entitled as a wife to a decree of judicial separation, but the ground on which the Court interferes in such cases is different from that on which it proceeds when the wife is the petitioner. When the wife is the complainant, the substantial ground for the Court's interposition is, that her personal safety is in jeopardy. When the husband is the complainant, it is because he may be tempted in defending himself to retaliate on his wife that the Court is bound to interfere, and to decree a judicial separation when such acts are proved. Generally speaking, that would be cruelty if practised by a wife towards her husband, which would be held to be cruelty if done by him towards her. I say generally speaking, for I think there must be some distinction necessarily founded on the great difference between the sexes, and the power of the husband in ordinary circumstances to protect himself from his wife's violence. Still the same great rule of danger to life or limb must prevail in this as in other cases of the same *genus*. Necessary protection is the foundation of all separation" <sup>(2)</sup>.

#### IV. RESTITUTION OF CONJUGAL RIGHTS.

Matrimonial  
Causes  
Act, 1884.

A party to a marriage may sue for restitution of conjugal rights upon the withdrawal by the other party from cohabitation *without just cause*. "Just cause" is the commission by the

<sup>(1)</sup> See *Hetherington v. Hetherington*, 12 P. D. 112.

<sup>(2)</sup> *Forth v. Forth*, 36 L. J. (Mat.)

122; *Furlonger v. Furlonger*, 5 N. C. 425.

party seeking restitution of either one or more of the matrimonial offences already enumerated. On proof of the petitioner's case, and in the absence of proof of just cause by the respondent, the latter, till the year 1884, was at the petitioner's mercy, and must have returned to cohabitation under pain of attachment and imprisonment. "So far," said Sir James Hannen <sup>(1)</sup>, "are suits for restitution of conjugal rights from being in truth and in fact what theoretically they purport to be—proceedings for the purpose of insisting on the fulfilment of the obligation of married persons to live together—that I have never known an instance in which it has appeared that the suit was instituted for any other purpose than to enforce a money demand." Such a condition of the law was calculated to work irreparable mischief in many cases, and hence an Act was passed in the year above-mentioned to remedy this blot in our legal system, to which public attention had been much directed by a case decided on that subject <sup>(2)</sup>.

The material provisions of that Act are as follows :—

Disobedience to a decree of restitution of conjugal rights is no longer enforceable by attachment, but when the application is by the wife the Court may when making the decree, or at any time afterwards, order the husband, if the decree be not complied with, to pay to the petitioner such periodical payments as may be just, the order to be enforceable like orders for alimony, and, if necessary, these payments may be ordered to be secured by deed <sup>(3)</sup>. By sect. 3, when the husband petitions for restitution, and the wife is entitled to property in possession or reversion, or in respect of trade profit or such like, the Court may make a settlement of her property or any part thereof on the husband and children of the marriage or either or any of them, and may order such part of the profits, &c. as may be just to be paid periodically for a like purpose.

By sect. 4 the Court may vary or modify its orders under the preceding section from time to time.

By sect. 5 non-compliance with a decree of restitution may be treated as desertion by the petitioner, and he or she may at once sue for judicial separation on the ground of desertion, and where the husband has already been guilty of adultery, the wife may sue for dissolution, and the decree, if pronounced, shall be an ordinary decree *nisi*.

<sup>(1)</sup> *Marshall v. Marshall*, 5 P. D. 23.

<sup>(2)</sup> *Weldon v. Weldon*, 9 P. D. 1883. and see *Weldon v. Weldon*, 10 P. D.

72, decided after the passing of the Act, 47 & 48 Vict. c. 68.

<sup>(3)</sup> *Theobald v. Theobald*, 15 P. D. 26.

Before a petition for restitution of conjugal rights can be filed, there must be a written demand for cohabitation and restitution of conjugal rights, which must be written in a friendly spirit, and shew the willingness of the petitioner to resume cohabitation <sup>(1)</sup>.

#### V. JACTITATION OF MARRIAGE.

A suit for jactitation of marriage <sup>(2)</sup> may be brought where one party "falsely boasts or gives out that he or she is married to another, whereby a reputation of their marriage may ensue." The Court, upon failure of proof of the marriage, "enjoins perpetual silence upon the defendant."

In 1862 a suitor took proceedings with reference to jactitation of marriage with his deceased mother <sup>(3)</sup>.

It was decided, however, that such a proceeding could not be instituted by any person other than one of the parties to the pretended marriage.

The action is now of extremely rare occurrence, and it has been characterised as a "moribund if not extinct form" of procedure <sup>(4)</sup>, but it will long be associated in the mind of the student of law with the celebrated case of the Duchess of Kingston—the leading case on the doctrine of estoppel (*ante*, p. 862 (which Mr. Browne tells us brought these actions into disrepute)) where it was decided (1) That a sentence against a marriage in a suit of jactitation of marriage is not conclusive evidence so as to stop the Crown from proving the marriage in an indictment for polygamy; and (2) that a judgment in such a suit may be set aside if obtained by fraud or collusion, fraud being as it was said in that case an "extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice, and, in Lord Coke's words, avoids all judicial acts ecclesiastical or temporal" <sup>(5)</sup>.

<sup>(1)</sup> Rule 175; *Field v. Field*, 14 P. D. 26, distinguished in *Smith v. Smith*, 15 P. D. 47, where the letter written by the wife herself was treated as sufficient.

<sup>(2)</sup> *Jactitation* is a term of the canon law, derived from a Latin word signifying to boast. Readers of Virgil may remember the taunt against Æolus, "illa se jactet in aula." Thus translated by Dryden:

"With hoarse commands his breathing subjects call  
And boast and bluster in his empty hall."

<sup>(3)</sup> *Campbell v. Corley*, 31 L. J. (Matt. 60) 1862; *Butler v. Dolben*, 2 Lee, 319; *Bodkin v. Case*, Milw. Ir. E. C. 356.

<sup>(4)</sup> Dixon on Divorce.

<sup>(5)</sup> Smith's Leading Cases, vol. ii.

## VI. LEGITIMACY DECLARATION ACT.

The Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93) provides that, any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject, depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply *by petition* <sup>(1)</sup> to the Court for divorce and matrimonial causes (*i.e.* not the Probate, Divorce, and Admiralty Division), praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage; or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may, in like manner, apply to such Court for a decree declaring that his marriage was or is a valid marriage, and such Court shall have jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just; and such decree, except as hereinafter mentioned, shall be binding to all intents and purposes on her Majesty and on all persons whomsoever.

Legitimacy  
Declaration  
Act  
1858.

The law on this subject was much considered in a case decided in 1887 <sup>(2)</sup>, where the President summed up the present state of the law as follows: "It is to be remembered that in any case of this kind the law prescribes this presumption in the outset, that any child born of a married woman is to be deemed to be the offspring of her husband, unless the contrary be shewn. That is, the onus of proof rests upon those who assert that the child born in wedlock is not the legitimate offspring of the two married people. At one time the law of England went very far in support of that presumption, and did not allow a child born of married people to be declared illegitimate unless it was proved to be impossible that the husband should have had access to the wife. Even to so great an extreme did the law go, that for many years—hundreds of years, I may say—it was the law that it must be shewn that the man was not in the kingdom, otherwise, if he was in the kingdom, it was to be presumed that the child of his wife was begotten by him."

(1) The claim cannot be made in a Probate action: *Warter v. Warter*, 15 P. D. 35.

(2) *Bosville v. Attorney-General*, 12 P. D. 178.

“ But that is not the law now ; the law has gradually relaxed those stringent rules ; and now a case of this kind is to be determined by a jury, like any other question of fact ” (1).

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(1) Per The President in *Bosville v. Attorney-General*, 12 P. D. 177. The President also directed the attention of the jury to another presumption of law, viz. that if it was proved to demonstration that at the time when the husband was sleeping with his wife, she was carrying on an adulterous intercourse with some

other man, so that it would be possible that the child should be the child of either the husband or the paramour, still the presumption is that it is the child of the husband. See, as to the practice under the Legitimacy Declaration Act : Dixon on Divorce, p. 376, *et seq.* ; Browne and Powles, 5th ed. p. 299, *et seq.*

## CHAPTER V

### SECONDARY JURISDICTION.

#### 1. ALIMONY.

The first branch of the secondary jurisdiction of the Divorce Division relates to the allotment of alimony and maintenance. Our law here proceeds upon the principle, fast becoming more and more a fiction, that as soon as husband and wife become involved in matrimonial litigation, the husband is supposed to have all the funds at his disposal, and the wife is supposed to be without means of support <sup>(1)</sup>. The Court, therefore, is at once called upon to order the husband to provide his wife with a portion of his income commensurate to her style of living, and to the circumstances of the case. When a periodical payment of money is allotted to the wife after she obtains a divorce without means, it takes a distinctive name, and is called "maintenance."

The provision in the nature of alimony which is made for the wife is of three kinds:—

Different kinds of alimony.

1. Alimony *pendente lite*, or pending suit <sup>(2)</sup>;
2. Permanent alimony in cases of separation <sup>(3)</sup>;
3. Permanent "maintenance" in cases of dissolution.

In each of the latter cases it will be observed the suit is no longer pending, but decided.

Let us first consider alimony pending suit (*pendente lite*).

A wife without means is entitled to alimony immediately after the commencement of the proceedings, *i.e.* after she has filed her petition, or been served with the husband's petition as respondent <sup>(4)</sup>.

How soon allotted.

The reason for this prompt course is two-fold: first, that she

And why.

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<sup>(1)</sup> It is almost unnecessary to point out here that since the Married Women's Property Act, 1882 (*ante*, p. 212, *et seq.*), the theory of the law by which all property of the wife was supposed to pass to the husband on the marriage is to a very large

extent practically obsolete.

<sup>(2)</sup> *Butler v. Butler*, 15 P. D. 13.

<sup>(3)</sup> *Re Robinson*, 27 Ch. D. 160, where it was held that alimony was not assignable.

<sup>(4)</sup> See *Miles v. Chilton*, 1 Rob. 700.

may be provided with means to live; and, second, that her husband may not be harassed by claims for her debts <sup>(1)</sup>.

Where the wife is shewn to have means of support independent of her husband, she will not obtain alimony so long as those means last <sup>(2)</sup>, and in a case where a wife had been living apart for years before the suit, and during that time had supported herself, and could still do so, alimony *pendente lite* was refused <sup>(3)</sup>.

How  
estimated

In allotting alimony the Court calculates all the husband's property, whether it produces interest or not. His average annual earnings usually form the basis of calculation, and the period upon which the average is taken is three years <sup>(4)</sup>.

The  
amount  
allotted.

The amount usually allotted is one-fifth of the joint income <sup>(5)</sup>, but this rule will be departed from on good cause shown <sup>(6)</sup>.

Permanent alimony and permanent maintenance are applied for by petition, as in the case of alimony pending suit, but not till the decree has been pronounced. In a very recent case before the Court of Appeal, an important question was raised with regard to permanent maintenance. The Court had granted the wife a dissolution of marriage on the ground of the cruelty and adultery of the husband, and subsequently made an order that the husband should pay her a certain income during her life. The wife had no fortune of her own, and the question arose whether the allowance ceased if she married again. The judges of the Court of Appeal said that, the 32nd section of the Divorce Act, 1857, gave the judge an absolute discretion as to the amount of the allowance, and the time, not exceeding the wife's life, during which it should continue, and as they saw no reason in this case to interfere with the discretion which the judge had exercised, they dismissed the appeal <sup>(7)</sup>. With regard to *permanent* alimony the general rule is to allow one-third of the joint income <sup>(8)</sup>.

Alimony.

In a case which came before the Court of Appeal in 1888 <sup>(9)</sup>, it was decided that where alimony *pendente lite* has been allotted

<sup>(1)</sup> *Holt v. Holt (et al.)* 38 L. J. (Mat.) 33.

<sup>(2)</sup> *Holt v. Holt (et al.)*, 38 L. J. (Mat.), 33 (1868).

<sup>(3)</sup> *Thompson v. Thompson*, L. J. 1 P. & D. 53 (1867).

<sup>(4)</sup> *Williams v. Williams*, 1 P. & D. 370. See, as to income, &c., and deduction therefrom: Dixon on Divorce, p. 338, *et seq.*

<sup>(5)</sup> Browne and Powles on Divorce, 5th ed. p. 226.

<sup>(6)</sup> *Blackburn v. Blackburn*, 36 L. J. (Mat.) 88; 16 L. J. (N.S.) 435. The procedure by which payment of alimony is obtained will be found specified in the Divorce Rules, 81-94 and 189-192 inclusive.

<sup>(7)</sup> *Lister v. Lister*, 15 P. D. 4.

<sup>(8)</sup> See as to practice in respect of orders for maintenance and alimony, *De Lossy v. De Lossy*, 15 P. D. 115; *Cook v. Cook*, 15 P. D. 116.

<sup>(9)</sup> *Dunn v. Dunn*, 13 P. D. 91.



to a wife in a petition for adultery, a right to alimony ceases as soon as the jury find her guilty of adultery, subject to this—that if the judge thinks it reasonable so to do he can continue it. “Thus, for instance, he may think it not improbable that the wife will obtain a new trial, and succeed ultimately in establishing her innocence; in such a case he might well think it reasonable that the alimony should be continued. To hold that alimony continues as a matter of right till an application for a new trial is disposed of, would encourage frivolous applications for new trials.”

Alimony.

In the case of a suit for nullity of marriage alimony continues payable after the decree *nisi* until the decree is made absolute <sup>(1)</sup>. The law on this subject was stated by the President (Sir J. Hannen) as follows:—“The practice of the Ecclesiastical Court being to allot alimony *pendente lite* until the decree is pronounced declaring the marriage a nullity, the only question in this case is what difference is made by the statute which substitutes a decree *nisi* in the first instance for a decree absolute. I think the only effect is to postpone the definite final declaration of nullity until the decree absolute, and that, therefore, the alimony *pendente lite* continues until that decree is made.”

The 32nd section of the Matrimonial Causes Act enables the Court if it shall think fit, *on a decree dissolving a marriage*, to order “that the husband shall, to the satisfaction of the Court, *secure* to the wife such gross sum of money for any term not exceeding his own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties.” The Court is also empowered, if it shall think fit, to suspend its decree until the deed has been duly executed. The reader will observe the important distinction between this order *securing* the amount payable which can only be made on dissolution of marriage and a mere personal order for payment of money <sup>(2)</sup>.

The subject is further dealt with by the Matrimonial Causes Act, 1866, passed to meet cases where a dissolution of marriage has been granted and the husband has no property on which the gross or annual sum can be secured, but would be able to pay a monthly or weekly payment to the wife. The Act provides

<sup>(1)</sup> *S.*, falsely called *B. v. B.*, 9 P. D. 80, 81

<sup>(2)</sup> See *Robotham v. Robotham*, 27 L. J. (Mat.) 61.

that in every such case the Court may make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable. The section also provides that if the husband shall afterwards from any cause become unable to make such payments, the Court may discharge or modify the order, or temporarily suspend it as to the whole or any part of the money ordered to be paid, and again revive the same order, "wholly or in part, as to the Court may seem fit."

The Court will not grant an injunction to restrain the husband from removing property out of the jurisdiction of the Court before an order for alimony has been made, merely to protect a wife's right to alimony <sup>(1)</sup>.

## 2. CUSTODY OF CHILDREN AND ACCESS TO THEM.

The question of the custody of the children in cases when husband and wife are engaged in matrimonial litigation is one for which special provision has been made by the Legislature in the Divorce Acts of 1857 and 1859 <sup>(2)</sup>. The effect of these sections with reference to this subject is that in suits for judicial separation, nullity of marriage or dissolution of marriage the Court may make orders for the custody, maintenance, and education of the children of the marriage, both pending at and after the final decree, or direct proceedings to be taken for placing the children under the protection of the Court of Chancery <sup>(3)</sup>.

The above powers have been extended by the Matrimonial Causes Act, 1884 <sup>(4)</sup>, to suits for restitution of conjugal rights. Sect. 6 of that Act provides that the Court may at any time before final decree, on any application for restitution of conjugal rights, or after final decree, *if the respondent shall fail to comply therewith*, upon application for that purpose, make from time to time all such orders and provisions with respect to the custody, maintenance, and education of the children of the petitioner and the respondent as might have been made by interim orders during the pendency of a trial for judicial separation between the same parties.

<sup>(1)</sup> *Newton v. Newton*, 11 P. D. 11. An order to pay alimony *pendente lite* is not a "final judgment" within s. 4, sub-s. 1 (g) of the Bankruptcy Act, 1883, on which a bankruptcy notice can be issued. *In re Henderson. Ex*

*parte Henderson*, 20 Q. B. D. 509.

<sup>(2)</sup> 20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4.

<sup>(3)</sup> *Thompson v. Thompson*, 31 L. J. (Prob. & M.) 213; 2 Sw. & Tr. 402.

<sup>(4)</sup> 47 & 48 Vict. c. 68, s. 6.

The jurisdiction of the Court under the above sections lasts until the children are sixteen years of age <sup>(1)</sup>.

Jurisdiction how long exercised.

The discretionary power of the Court in these cases has been held to be very great, exceeding that previously exercised by Courts of law or equity <sup>(2)</sup>. The Court may indeed be said to have absolute discretion with regard to the custody of the children of the parties who come before it, but this discretion it exercises with the utmost caution and regard, and for the interests of the children <sup>(3)</sup>.

The first and governing object of the Court is the interest of the children, that is the paramount object both on *interim* and final applications.

The interests of the children come first.

The second consideration with the Court is the rights of the parties. The principles on which the Court proceeds were well stated by the President in *D'Alton v. D'Alton*, as follows <sup>(4)</sup> :—

Then the rights of the parties.

“The principle which guides the Court is that the innocent party shall suffer as little as possible from the dissolution of the marriage, and be preserved as far as the Court can do so, in the same position in which she was while the marriage continued; first, by giving her a sufficient pecuniary allowance for her support; and, secondly, by providing that she should not be deprived of the society of her children unnecessarily; as it has been put by one of my predecessors, ‘the wife ought not to be obliged to buy the relief to which she is entitled, owing to her husband’s misconduct at the price of being deprived of the society of her children.’”

As a general rule where husband and wife are separated, owing to the fault of one, the other party has the *prima facie* right to the custody and society of the children <sup>(5)</sup>. When the question of guilt or innocence is still in doubt, and one of the parties manifestly desires the custody of the children more than the other that party will usually obtain it <sup>(6)</sup>. Thus in a case where it was proved that the wife’s health had suffered by reason of her being deprived of the society of her children the custody was given to her, while the father was allowed access to them once a fortnight. In another case, where both parents

<sup>(1)</sup> *Mallinson v. Mallinson*, 35 L. J. (Mat.) 84; 1 P. & D. 221; 14 W. R. 978.

<sup>(2)</sup> *Marsh v. Marsh*, 1 Sw. & Tr. 215; *Spratt v. Spratt*, 1 Sw. & Tr. 215.

<sup>(3)</sup> *Robotham v. Robotham*, 27 L. J. (Mat.) 61; 1 Sw. & Tr. 190; 31 L. T. 238.

<sup>(4)</sup> See *D'Alton v. D'Alton*, 47 L. J. (Pro. & Mat.) 59, and cases there cited.

<sup>(5)</sup> *Martin v. Martin*, 2 L. T. (N.S.) 118; and *Suggate v. Suggate*, 29 L. J. (Mat.) 167.

<sup>(6)</sup> *Barnes v. Barnes*, 1 P. & D. 463.

were kind to their children, the immediate cause of the separation being traceable to the husband, it was ordered that the children of tender years should be placed with their mother, and that the older ones should remain with their father <sup>(1)</sup>.

Indifference until the question is brought before the Court will injure the indifferent party's case, and create a suspicion that it is not *bonâ fide* <sup>(2)</sup>.

Fitness of  
the parties.

It should be stated that the father has a common law right to the custody of the children of the marriage up to sixteen years of age, and this will not be interfered with where the rights of the parties are equal, except in the case of children of tender years who for their own benefit are best cared for by the mother <sup>(3)</sup>.

Innocent  
parties.

An innocent father retains the custody of his children, and the innocent mother is spared from suffering as much as possible. She will not be deprived of the society of her children unnecessarily. She will not be compelled to purchase freedom from her husband's irksome rule by relinquishing the companionship of her children <sup>(4)</sup>.

Facts of  
the case  
govern  
decision  
of the  
Court.

The existing facts of the case will guide the Court to a decision to the exclusion of allegations and the postponement of less vital considerations. The age of the children, their position in the family and the pending litigation affect its decision, notwithstanding the charges and counter-charges which are not yet sifted by the Court.

Third  
parties.

Where neither husband nor wife are fitted to have the custody and control of their children, it will be entrusted to third parties selected by the Court with reasonable access to the parents <sup>(5)</sup>.

Variation  
of orders.

An order for custody may be varied upon a change of circumstances or other sufficient cause shewn <sup>(6)</sup>.

A recent enactment (49 & 50 Vict. c. 27) passed in 1886 to amend the law relating to the guardianship and custody of infants (*ante*, p. 609), deals specially with the guardianship and custody of the children of a marriage, where there has been a decree of judicial separation or divorce. It provides (sect. 7)

<sup>(1)</sup> *Martin v. Martin*, 2 L. T. (N.S.) 118; and *Suggate v. Suggate*, 29 L. J. (Mat.) 167.

<sup>(2)</sup> *Codrington v. Codrington*, 3 Sw. & Tr. 496; 10 L. T. (N.S.) 387.

<sup>(3)</sup> *Barnes v. Barnes*, 1 P. & D. 463.

<sup>(4)</sup> *D'Alton v. D'Alton*, 47 L. J.

(Mat.) 59.

<sup>(5)</sup> *Chetwynd v. Chetwynd*, 1 P. & D. 39; 35 L. J. (Mat.) 21.

<sup>(6)</sup> *March v. March, et al.*, L. R. 1 P. & D. 439. The procedure for obtaining and carrying out orders of the Court is found in rules 104 and 105, and further rules there mentioned.

that "in any case where a decree for judicial separation, or a decree either *nisi* or absolute for divorce, shall be pronounced, the Court pronouncing such decree may thereby declare the parent, by reason of whose misconduct such decree is made, to be a person unfit to have the custody of the children, if any, of the marriage, and, in such case, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children."

In a case decided in 1888, in which the wife prayed for a dissolution of the marriage, on the ground of adultery, coupled with cruelty which was of an aggravated character, the President, after pronouncing a decree *nisi*, made an order under sect. 7 of the Guardianship of Infants' Act, 1886, declaring the respondent who did not appear to oppose the application, to be an unfit person to have the custody of the children <sup>(1)</sup>.

### 3. APPLICATION OF DAMAGES.

The Divorce Act, 1857 <sup>(2)</sup>, provides that the husband may claim damages from an adulterer in a petition for judicial separation or dissolution, or in a petition limited to the object of obtaining damages only.

In practice, damages are claimed, as a rule, in suits of dissolution only.

The amount claimed must be fixed in the petition, but it is not necessarily an indication of the amount that will be recovered <sup>(3)</sup>. The amount claimed

This is always settled by a jury, but the application of the damages so recovered is settled by the Court (Matrimonial Causes Act, 1857, s. 33). and recovered.

The measure of damages is the value to the petitioner of the wife he has lost, through the instrumentality of the co-respondent, and the co-respondent's position does not affect the question, but where he has used his fortune as a means of seduction it may be taken into account <sup>(4)</sup>. The measure of damages.

The law on this subject was expounded by the President to a jury in 1886, in the following terms:—"First, you must remember that you are not here to punish at all. Any observations directed to that end are improperly addressed to you. All that the law permits a jury to give is compensation for the

<sup>(1)</sup> *Skinner v. Skinner*, 13 P. D. 90. See *Re Manders*, W. N. (1890) 222.

<sup>(2)</sup> 20 & 21 Vict. c. 85, s. 33.

<sup>(3)</sup> *Spedding v. Spedding*, 31 L. J.

(P. & M.) 96.

<sup>(4)</sup> Per Sir C. Cresswell, *Cowing v. Cowing*, 33 L. J. (Mat.) 149, and see cases in note thereto.

loss which the husband has sustained. That is the only guide to the amount of damages to be given. But undoubtedly, if it is proved that a man has led a happy life with his wife, that she has taken care of his children, that she has assisted in his business, and then some man appears upon the scene and seduces the wife away from her husband, then the jury will take those facts into consideration. But the question in this case, as in so many others, is, whether or not these losses have been cast upon the petitioner by the action of the co-respondent. If he did not seduce her away from her husband, that makes a very material difference in considering the amount of damages to be given" (1).

The application of the damages is governed by the circumstances of the case. At times it is set apart to provide a fund for the wife's maintenance (2), or for the maintenance and education of the children of the marriage (3), but first of all come the petitioner's costs (4). The Court will in proper cases make orders for speedy payment or to facilitate obtaining payment (5).

#### 4. SETTLEMENT OF PROPERTY.

General  
rule of the  
Court.

Upon the decision of many suits it becomes necessary to re-adjust the marriage settlements existing to meet the altered circumstances of the case. The general rule of the Court is that the variation and disposition of the property in settlement will be governed entirely by the circumstances of the case at the time the application to vary the settlement is made (6).

The conduct of the parties and their pecuniary position is taken into consideration (7).

In a case which came before the President in 1887, a petition was presented for variation of the settlements after a decree of dissolution of marriage by reason of the wife's adultery. The trusts of the settlements were of the usual character (see *ante*, p. 136, *et seq.*), viz., giving each of the parties a life interest, and then providing for the children of the marriage. A child had been born between the date of the decree *nisi* and decree absolute, and fourteen months after the wife had eloped from her husband.

(1) *Keyse v. Keyse & Maxwell*, 11 P. D. 100.

(2) *Latham v. Latham & Gethim*, 30 L. J. (Mat.) 43.

(3) *Billingsay v. Billingsay, et al.*, 35 L. J. (Mat.) 84.

(4) *Taylor v. Taylor*, 39 L. J. (Mat.) 23.

(5) See cases on these points collected: Browne & Powles on Divorce, 5th ed. p. 202, *et seq.*

(6) *March v. March, et al.*, 36 L. J. (Mat.) 38, and see *Benyon v. Benyon and O'Callaghan*, 15 P. D. 29.

(7) *Chetwynd v. Chetwynd*, 1 P. & D. 39; 35 L. J. (Mat.) 35.

The Court ordered the interests of the parties to be extinguished, but refused to transfer the funds in settlement to the parties free from the trusts of the settlement, and refused to order an inquiry into the legitimacy of the child <sup>(1)</sup>.

The conduct of the parties is a material circumstance, and it is the duty of the Court to consider whose fault it is that the marriage has come to an end, not with a view of punishing the guilty party, but for the purpose of seeing what provision it is reasonable to make <sup>(2)</sup>. The judge has an absolute judicial discretion as to the provisions to be made for the parties respectively out of settled property, and the Court of Appeal will not interfere with that discretion unless there has been a clear miscarriage in its exercise. <sup>(3)</sup>

### 5. PROTECTION ORDERS.

Wives living apart from their husbands, and acquiring property since their husbands deserted them, were liable till recently to have their property seized by the husband. To meet this gross injustice, the Court was empowered to grant protection orders upon the application of the wife.

In considering at the present day the question whether it is necessary in a particular case to apply for a protection order, the provisions of the Married Women's Property Act, 1884, must always be borne in mind, under which all property belonging to women married after 31st of December, 1882, or acquired after that date, by women, whenever married, belongs to them for their separate use.

Protection orders may be applied for under the Matrimonial Causes Act, 1857, s. 2, either to the Divorce Court or in cases where the wife's position precludes her from the expense of this course, she may apply to a metropolitan magistrate if she lives within his district, or to the justices in petty sessions if she lives in the country, for an order to protect any money or

How  
applied for.

<sup>(1)</sup> *Pryor v. Pryor and Shelford*, 12 P. D. 165.

The statutory enactments relating to marriage settlements are M. C. A., 1857, s. 45; 1859, s. 5; 1860, s. 6 (2); 1878, s. 3. The rules relating to the procedure by which variation of settlements is effected are Nos. 95 to 103 inclusive, and 204.

<sup>(2)</sup> *Wigney v. Wigney*, 7 P. D. 177. The general practice is that a petition for variation of settlements should

be signed by the petitioner, but the Court will, under special circumstances, allow his solicitor to sign it on his behalf: *Ross v. Ross*, 7 P. D. 20.

<sup>(3)</sup> See as to variation of settlements, *Benyon v. Benyon*, 15 P. D. 29; affirmed 15 P. D. 54; *Swift v. Swift* (restitution of conjugal rights.) 15 P. D. 86, 118; *Nunneley v. Nunneley & Morran* (settlement in Scotch form), 15 P. D. 186.

property she may acquire by her own lawful industry and property which she may become possessed of after desertion against her husband or his creditors, or any person claiming under him, &c. Such an order, if made by a police magistrate or justices at petty sessions, shall within ten days after the making thereof be entered with the registrar of the county court, within whose jurisdiction the wife is resident <sup>(1)</sup>.

#### 6. REVERSAL OF DECREES OF JUDICIAL SEPARATION, OF DECREES NISI, AND OF DECREES OF NULLITY.

When a decree of judicial separation has been obtained contrary to the justice of the case, and in the absence of the respondent, he or she is entitled, on proof of the facts, to a reversal of the decree under s. 23 of the Matrimonial Causes Act, 1857.

A similar power of reversing a decree *nisi* for divorce on good cause shewn, such as collusion or the guilt of the petitioner, exists under the Matrimonial Causes Amendment Act, 1873, which embodies the section of the earlier Act here cited, and applies it to suits for nullity <sup>(2)</sup>.

#### SEPARATION DEEDS.

Matrimonial differences are not unfrequently quietly settled without an appeal to the Court by means of separation deeds. The law now not only recognises the legality of such instruments, but even as has been pointed out in another portion of this work, enforces specific performance of agreements for present separation, though it declines to enforce agreements for future separation (*ante*, p. 577). The great change which has taken place in judicial opinion on this point was commented on by Sir George Jessel in a well known case in the following terms.

“ For a great number of years, both ecclesiastical judges and lay judges thought it was something very horrible, and against public policy, that the husband and wife should agree to live

Change in  
judicial  
opinion.

<sup>(1)</sup> The Divorce Rules relating to protection orders are 124, 125, and 197. The provision as to registration in the county court is directory and not imperative: *In the Goods of Farraday*, 31 L. J. (P. M. & A.) 7.

<sup>(2)</sup> The procedure under the above sections is regulated as regards judicial separation by rules 63 to 66 in-

clusive, as regard decrees *nisi* by rules 70 to 76. These rules apply only to any person other than the Queen's Proctor; to him rules 61 and 69 apply in relation to his intervention in any cause, and rule 202 when he shows cause against a decree *nisi* for dissolution or nullity of marriage.



separate, and it was supposed that a civilized country could no longer exist if such agreements were enforced by Courts of law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy; other considerations arose, and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and scandal of suits of divorce by settling their differences quietly by the aid of friends out of Court, although the consequence might be that they would live separately, and that was the view carried out by the Courts, when it became once decided that separation deeds *per se* were not against public policy" (1).

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(1) *Besant v. Wood*, 12 Ch. D. 605, 620.

## CHAPTER VI.

## PRACTICE.

Proceedings for divorce or other matrimonial causes are specially excepted from the Judicature Rules, and the practice is governed by special rules with regard to the details of which the reader is referred to the authorities mentioned in the note hereto <sup>(1)</sup>. It has been decided that appeals for costs can be brought from the Divorce Court by leave just as in the other Divisions <sup>(2)</sup>.

Com-  
mencement  
of proceed-  
ings.

Proceedings before the Court for Divorce and Matrimonial Causes are commenced by filing a petition with a citation.

The citation corresponds in some respects with the writ of summons at common law; it is a document directed to the respondent or co-respondent, and commands the party to appear within a certain time mentioned, and a warning that in case of default the judge or judges (as the case may be) will proceed to hear the charge mentioned therein, his absence notwithstanding <sup>(3)</sup>.

Every petition must be accompanied by an affidavit made by the petitioner, verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and the affidavit must be filed with the petition.

In cases where the petitioner is seeking a decree of nullity of marriage, or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage, the petitioner's affidavit, filed with his or her petition, must further state that no collusion or connivance exists between the petitioner and the other party to the marriage or alleged marriage.

<sup>(1)</sup> Dixon on Divorce; Browne and Powles on Divorce; Oakley's Divorce Practice.

<sup>(2)</sup> *Smith v. Smith*, W. N. 1882, 91.

<sup>(3)</sup> See rules and cases thereon: Browne and Powles, 5th ed. p. 313, *et seq.*, and see, as to amendment and reservice of petition: *Charter v. Charter*, 58 L. J. (P. D. & A.) 44;

as to striking out petition: *Onslow v. Onslow*, 60 L. T. 680; as to loss of original citation: *Cridland v. Cridland*, 60 L. T. 398; as to service abroad: see *Trubner v. Trubner and Christiani*, 15 P. D. 24; and as to dispensing or not dispensing with service on the co-respondent, *Cornish v. Cornish*, 15 P. D. 131; *Bagot v. Bagot & Selton*, W. N. (1890) 38.

The following is the form of a petition <sup>(1)</sup> for divorce :—

Form of  
petition.

In the High Court of Justice.

Probate, Divorce, and Admiralty Division (Divorce).

To the Right Honourable the President of the said Division,

The            day of            188            .

The petition: A. B., of            sheweth :—

(1.) That your petitioner was, on the            day of            , lawfully married to C. B., then C. D., spinster (or widow), at

(2.) That after his said marriage your petitioner lived and cohabited with his said wife at

(3.) That on the            day of            188            , and on other days between that day and            the said C. B., at            in the county of            committed adultery with X. Y.

Your petitioner, therefore, humbly prays that your lordships will be pleased to decree, &c.

(Signature)

It has been decided by the Court of Appeal <sup>(2)</sup> that in a suit for nullity of marriage, the Court has power to give leave to administer interrogatories between the parties to the suit. It was also decided in the same case that leave to administer interrogatories ought not to be refused on the ground, that it is plain from the nature of the case that they must necessarily criminate the party interrogated, who cannot answer them without admitting that he has been guilty of felony. The interrogated party may, however, decline to answer the interrogatories.

Where the petitioner in divorce proceedings dies there is no right of revivor in the personal representatives so as to make the decree absolute <sup>(3)</sup>. Death of  
petitioner.

In this case in which this point arose, one of the judges of the Court of Appeal in delivering judgment said: "A man can no more be divorced after his death than he can after his death be married or sentenced to death. Marriage is a union of husband and wife for their joint lives unless it be dissolved sooner, and the Court cannot dissolve a union which has already been determined. An Act of Parliament might indeed give the Court power to pronounce after the death of one of the parties

<sup>(1)</sup> See as to precedence in cases of cross-petitions, *Cautley v. Cautley*. *Cautley v. Cautley & Playfair*, W. N. (1890) 48, 49; and as to question of dismissal for non-prosecution, *Southern v. Southern*, W. N. (1890) 80.

<sup>(2)</sup> *Harvey v. Lovelkin*, 10 P. D. 122, where the history of the former practice is carefully considered.

<sup>(3)</sup> *Stanhope v. Stanhope*, 11 P. D. 103, 108.

a decree declaring the marriage dissolved from a certain past date, but has the Act done so? I think not. If a decree *nisi* is made, and the husband dies before it is made absolute, he dies while he is still at law a husband, and his wife becomes his widow. After this, how can a decree be made which would displace a dissolution of the marriage by death and untie a knot that no longer exists. How can a woman, once a widow, be converted into a divorcée, unless there is some enactment enabling the Court to make such a retrospective order" (1).

Insanity.

In 1874 the House of Lords was called upon to determine the important question whether, when a petition for a divorce was presented against a wife, which was met by an allegation that she was insane, and consequently unfit and unable to answer the petition, or give due instructions for her defence, such insanity was a bar to the proceedings. The House of Lords consulted the judges, and decided that in this case insanity was not a bar, and Lord Hatherley laid down the important principle that in the proceedings against a criminal every step is arrested by his or her becoming a lunatic, but that as the procedure in divorce is not a criminal proceeding, the rule has no application thereto (2).

The converse case to that which we have just considered came before the Court six years after the decision of the House of Lords in *Mordaunt v. Moncreiff* (3).

*Mordaunt v. Moncreiff* was a case where the lunatic was respondent. The question which now came before the Court was whether a lunatic husband or wife could present a petition by his or her committee for dissolution of marriage; whether or not, as the President expressed it, to the proposition that a lunatic might be sued in such an action, it was a corollary that the lunatic might sue.

This question was answered in the affirmative, and the President in the course of a learned and elaborate judgment, in which he deals carefully with the various arguments in the case, expressed himself as follows:—

"The difficulties which are presented in the case of a lunatic petitioner are indeed different in character, but they do not appear to me to be more formidable than those to which I have adverted in the case of a lunatic respondent. If the proceedings are in the one case to be put on the same footing as other civil proceedings, I can see no reason why they must not be so in

(1) Per Bowen, L.J., in *Stanhope v. Stanhope*, 11 P. D. 103. Cas. 374.

(3) *Baker v. Baker*, 5 P. D. 143.

(2) *Mordaunt v. Moncreiff*, 2 App.

the other. If an insane respondent must defend herself as best she may by means of a guardian *ad litem*, I do not see where the Act has indicated that an insane petitioner may not institute a suit for divorce through his committee, as he might sue for the breach of an ordinary contract. The only provision which has been pointed to as having such an effect is the 41st section, which requires the petitioner to verify his or her petition by affidavit, so far as he or she is able to do so, but, as Lord Hatherley has pointed out, this section is equally applicable to suits for nullity and judicial separation, which could undoubtedly, before the Act of 1857, be instituted on behalf of a lunatic by his committee. It cannot be supposed that it was intended, by the mere provision that the facts should be verified by the petitioner's affidavit, to prevent for the future such suits being instituted. I entertain no doubt that I have power in such cases to allow the husband's committee, who would in fact be the petitioner on the lunatic's behalf, to make the required affidavit, and that is what has been done in this case without objection on the part of the respondent <sup>(1)</sup>.

Insanity of  
petitioner.

The question of costs in divorce proceedings must now be briefly noticed. Costs.

The general rules on which the Court proceeds with regard to this subject are of a very peculiar nature, but in considering it must never be forgotten that the Court has now an absolute discretion as to all questions of costs, and can at any time depart from the general rules which govern its practice in this respect.

The general rule which renders the husband liable for the wife's costs is based on the principle that the husband has all the means, and that it would be unfair that she should be left without the sinews of war for her defence where her character is attacked, but the exception arises where the reason fails, *i.e.* where the wife is possessed of separate property <sup>(2)</sup>.

The rule on the subject of costs provides <sup>(3)</sup> that after directions given as to the mode of hearing or trial of a cause, or in an earlier stage of a cause, by order of the judge ordinary, or of the registrar, a wife who is a petitioner, or has entered an appearance as respondent in a cause, may file a bill or bills of costs for taxation against her husband, and the registrar to whom such bills of costs are referred for taxation shall, when the cause is set down, ascertain what is a sufficient sum of

<sup>(1)</sup> *Baker v. Baker*, 5 P. D. 143; see *Fry v. Fry*, 15 P. D. 25, 50.

<sup>(2)</sup> *Robertson v. Robertson*, 6 P. D. 119; *Dixon on Divorce*, p. 379.

<sup>(3)</sup> Rules and Regulations, No. 158, as amended 14th July, 1875, with a verbal alteration to meet subsequent changes in practice.

## Costs.

money to be paid into the registry, or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause; and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed by the registrar.

The rule then contains the important proviso that in case the husband should by reason of his wife *having separate property*, or *for other reasons*, dispute her right to recover any costs pending suit against him, the registrar may *suspend* the order to pay the wife's taxed costs, or to pay or secure the sum ascertained to be sufficient to cover her costs of and incidental to the hearing of the cause, for such length of time as shall seem to him necessary to enable the husband to obtain the decision of the Court as to his liability.

The next rule, 159, provides that when on the hearing or trial of a cause the decision of the judge ordinary, or the verdict of the jury is against the wife, no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the judge ordinary at the time of such hearing or trial.

In forming his estimate as to the proper amount to be paid into Court, or secured for the wife's further costs, the registrar takes into account the number of witnesses, the counsel's fees, solicitor's charges, and other matters. The order has to be complied with within seven days, and if not complied with may be enforced by attachment, or, if payment of costs is included in it, by *fi. fa.* The order, when made, has the effect of staying all proceedings against the wife as the hearing will not be fixed until it is obeyed, and the husband to obey it may be ordered to attend and be cross-examined as to his means. If the wife succeeds at the trial, she gets full costs. If not, "the usual order" is that the amount which the husband has paid or secured shall go to the wife's solicitor <sup>(1)</sup>.

The rules of the Court with regard to costs in divorce suits was much considered in two cases, one of which came before the Court of Appeal in 1881, and the other of which was decided by the President in 1882. In the first of these <sup>(2)</sup> the history of the law is considered by Sir George Jessel, and the principle was laid down that in a divorce suit the costs of the wife

<sup>(1)</sup> Browne and Powles, 5th ed. *Lynch*, 10 P. D. 183.

p. 341; Oakley's Divorce Practice; <sup>(2)</sup> *Robertson v. Robertson*, 6 P. D. 119.  
Dixon on Divorce; and see *Lynch v.*

payable by the husband are not limited to the amount paid Costs.  
into Court or secured by the husband for that purpose.

In the latter case <sup>(1)</sup> the President commented on the case from which we have just quoted, and stated the rule of practice as follows:—"The result seems to be that the Lords Justices consider that, on the true construction of rule 159, the wife is not bound at the trial to show why she should be allowed more than the sum, which on her own solicitor's statement of the facts, the registrar deemed sufficient, but the husband is to show cause why she should not be allowed all that she may claim. This cannot be done at the trial, for the husband does not then know what the wife's claim will be, nor can it be effectually done before the registrar, for he does not know the judge's view of the necessity for the additional costs claimed. The judge himself must therefore, if required to do so, consider the propriety of the wife's bill of costs when brought in. This is the course which I have proposed to take in every case which has arisen since the decision of the Court of Appeal in *Robertson v. Robertson* <sup>(2)</sup>.

The law with regard to the liability of the separate estate of a married woman was summed up by the President in a very recent case as follows:—"I really cannot entertain any doubt whatever as to what is just, and that if a woman has separate income, and has put her husband to enormous expense in establishing her guilt, she ought to indemnify him as any ordinary suitor does. In considering what is just, it does not appear to me to have any bearing on the question to say that at the time she did the wrong she had or had not any separate estate; but the question is, what is just at the time when the Court has to arrive at the decision on the subject. From the institution of this Court the judges of it have uniformly held that they had jurisdiction to condemn a wife in costs if they found she had separate estate and that it was just that she should pay. I therefore base my decision on what has been the uniform practice of the Divorce Court, and of this Division since the Divorce Court became merged in the High Court" <sup>(3)</sup>.

Liability of  
separate  
estate.

In a case which came before the Court in 1889, an application was made for the first time in the Matrimonial Court, under sect. 17 of the Married Women's Property Act, 1882 (see *ante*, p. 224). A summons was taken out calling on the husband to

<sup>(1)</sup> 7 P. D. 84, and see 7 P. D. *Smith*, 7 P. D. 84.  
p. 227, as to security for costs.

<sup>(2)</sup> Per the President in *Smith v. Hyde*, 59 L. T. (N.S.) 523.  
<sup>(3)</sup> Per the President in *Hyde v.*

show cause why he should not forthwith hand over to the wife certain articles of jewellery, and other things which she claimed as part of her separate estate. The registrar made the order, but the judge decided that the registrar had no jurisdiction to make any such order, and that the matter ought to be referred back to him to inquire as to the property in the articles in question, and then report to the judge <sup>(1)</sup>.

Appeals.

With regard to appeals from the Divorce Court, the 9th section of the Judicature Act of 1881 substitutes the Court of Appeal for the full Divisional Court, to which the appeal previously lay. The same Act also provides that the decision of the Court of Appeal on any question arising under the Acts relating to divorce and matrimonial causes, or to the declaration of legitimacy, shall be final, except where the decision either is upon the grant or refusal of a decree on a petition for dissolution or nullity of marriage, or for a declaration of legitimacy, or is upon a question of law on which the Court of Appeal give leave to appeal; and, that save as aforesaid, no appeal shall lie to the House of Lords under the said Acts <sup>(2)</sup>. Appeals to the Court of Appeal from the Probate Division must be within fourteen days, and the Court has no power to enlarge the time.

Sect. 10 of the Judicature Act, 1881, provides that no appeal from an order absolute for dissolution or nullity of marriage shall henceforth lie in favour of any party who, having had time and opportunity to appeal from the decree *nisi* on which such order may be founded, shall not have appealed therefrom.

In a case <sup>(3)</sup> where husband and wife were both found guilty of adultery, and the husband was also found guilty of cruelty of an aggravated character, the judge refused to decree dissolution of marriage, but granted the wife a decree for judicial separation, and gave her her costs. The husband having appealed, the Court of Appeal discharged the order for judicial separation, and held, that the wife was entitled, notwithstanding her adultery, to her costs both in the Court below and on the appeal.

The practice as to proceeding with respect to Irish divorce bills, to which allusion has been previously made (*ante*, p. 997), was made the subject of consideration in a number of recently reported cases. In these cases, the important principles laid

<sup>(1)</sup> *Wood v. Wood and White*, 14 P. D. 157; 58 L. J. P. D. & A. 68.

<sup>(2)</sup> 44 & 45 Vict. c. 68, s. 9; *Cleaver*

*v. Cleaver*, 9 App. Cas. 631; *Ahier v. Ahier*, 10 P. D. 110.

<sup>(3)</sup> *Otway v. Otway*, 13 P. D. 141.



down that acts which would be considered legal cruelty in the Divorce Court will be so considered in divorce bills <sup>(1)</sup>, and that the same evidence which since the Divorce Act, 1857, enables the Divorce Court to pronounce a decree for dissolution of marriage will be considered by the House of Lords sufficient a ground for passing a divorce bill <sup>(2)</sup>.

Irish  
divorce  
bills.

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(<sup>1</sup>) *Giffard's Divorce Bill*, 12 App. Cas. 362. *Hewat's Divorce Bill*, 12 App. Cas. 312; *A.'s Divorce Bill*, 12 App. Cas.

(<sup>2</sup>) *Westropp's Divorce Bill*, 11 App. Cas. 294. And see further *Joynt's Divorce Bill*, 13 App. Cas. 741.

## BOOK XI.

### ADMIRALTY.

#### CHAPTER I.

##### JURISDICTION.

Assign-  
ment of  
business.

The 34th section of the Judicature Act, as has already been pointed out (*ante*, p. 356), assigned to the Probate, Divorce and Admiralty Division of the High Court (in addition to all causes and matters of the same description pending on the 2nd of November, 1875, the date of the commencement of that Act), all causes and matters which would have been within the exclusive cognizance of the Court of Probate, or of the Court for Divorce and Matrimonial Causes, or of the High Court of Admiralty, if that Act had not passed <sup>(1)</sup>.

The object of the following pages is to briefly consider the Admiralty portion of the business so assigned, or perhaps we should rather say, having regard to the fact that the other divisions have (as pointed out hereafter, p. 1050), a concurrent jurisdiction, those actions which can be most effectively and conveniently brought in this branch of the Probate, Divorce, and Admiralty Division, and some of the leading peculiarities of the practice peculiar to it.

Principles  
of Admi-  
ralty law.

“The law which was administered by the Admiralty Court of England and is now administered by the Probate, Divorce, and Admiralty Division,” said the Court of Appeal in a recent case, “is the English Maritime Law. It is not the ‘common maritime law’ which is not the law of England alone, but the law of all maritime countries. But it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and traditions, and principles, has adopted as the English Maritime Law” <sup>(2)</sup>.

Actions  
*in rem* or *in*  
*personam*.

The essential difference between actions in other divisions of the High Court and actions in Admiralty is that, in the former class of actions the action is only *in personam*, *i.e.*, against the defendant personally, while in Admiralty actions, there is the

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<sup>(1)</sup> The law as to the exercise of Admiralty jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom was amended

(July 25, 1890) by the Colonial Courts of Admiralty Act, 1890.

<sup>(2)</sup> *The Gactano and Maria*, 7 P. D. 143.

alternative of taking proceedings *in personam* or *in rem*, i.e., against a certain *res* or thing. In an important case, to which we shall have occasion to refer for another purpose, an action *in rem* was described or defined as a proceeding directed against a ship or other chattel in which the plaintiff seeks either to have the *res* adjudged to him in property or possession, or to have it sold, under the authority of the Court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims <sup>(1)</sup>.

In the other Divisions of the High Court only actions *in personam* can be brought. Now the defendant may be hard to find, or he may be resident out of the jurisdiction, and have no property within the jurisdiction, or, though within the jurisdiction and easily found, he may be insolvent, and in any of these cases the remedy by action *in personam* might be of little service. But when the action is brought *in rem* in the Admiralty Division, however far the offender may be removed from the arm of the law, or however unsubstantial his resources may be, there is a remedy against a substantial thing, viz., the vessel itself, or other *res*, e.g., the cargo or the freight, which may be seized and sold under warrant of the Court, if bail be not forthcoming, and the proceeds applied to satisfy the claims of justice <sup>(2)</sup>.

Actions *in rem* and *in personam*.

The remedy *in rem* in the Admiralty Division, and the remedy *in personam* in any other Division of the High Court, are treated by the law as distinct. Thus it has been decided that a plaintiff who has brought his common law action in a cause of collision, and recovered a verdict, is entitled, if the defendant proves insolvent, to proceed against the ship in the Court of Admiralty, and that even after the ship has changed hands since the collision and been transferred to a third party <sup>(3)</sup>.

On the other hand, where a plaintiff had obtained the whole proceeds of the sale of the defendant's vessel under a decree of the Admiralty Court in a collision suit, and the amount so recovered was insufficient to cover the damage which the plaintiff had sustained, such recovery was regarded as no bar to a subsequent action *in personam* in a Court of Common Law <sup>(4)</sup>. It must, however, be borne in mind that this decision was pronounced before the Judicature Acts came into operation, and that under the present practice if the remedy *in rem* proved

<sup>(1)</sup> *The Henrich Björn*, 11 App. Cas. 270, at p. 276, per Lord Watson.

<sup>(3)</sup> *John and Mary*, Swabey, 471.

<sup>(4)</sup> *Nelson v. Couch*, 15 C. B. (N.S.)

<sup>(2)</sup> R. S. C., 1883, Order v. r. 16.

99.

Actions *in rem* and *in personam*.

insufficient the Admiralty Division would have jurisdiction to enforce the independent personal remedy.

It must be borne in mind that in most of the cases arising out of the foregoing subjects the other divisions of the High Court have jurisdiction as well as the Admiralty Division.

But it is often convenient and at the same time much to the advantage of a plaintiff to bring his action in the Admiralty Division, as in addition to the benefit of proceeding *in rem* which we have already mentioned, he may obtain a Court which has special experience on shipping matters, and is assisted on technical questions by assessors skilled in maritime affairs.

This great distinction between the action *in rem* and the action *in personam* characterises alike—(1) the mode in which the proceedings in an action are commenced; (2) the form prescribed by the law for the service of its process, and (3) the judgment by which the fruits of the action are ultimately obtained.

1. *As to the commencement of the action.*—The plaintiff is not compelled to address his writ to a particular individual or firm, as in an ordinary action *in personam* between A. B. as plaintiff and C. D. or the firm E. F. & Co. as defendants, in which A. B. claims certain personal relief against C. D. or E. F. & Co., but he may address it to whoever may happen to be the owner of the ship or goods sought to be charged. This writ is served on the *res*, and binds it for the plaintiff's claim, whether the owner is known or not.

The form of writ in the action *in rem* is as follows:—

In the High Court of Justice,

Probate, Divorce and Admiralty Division.

Between A. B., plaintiff,

and

The owners of the Mary.

Victoria, by the Grace of God, &c.

To the owners and parties interested in the ship or vessel—of the port of—(or cargo, &c., as the case may be).

We command you, &c.

2. *The service of the process of the Court.*—In Admiralty actions *in rem*, service of a writ of summons or warrant against ship, freight, or cargo on board, is effected by nailing or affixing the original writ or warrant for a short time on the mainmast, or on the single mast of the vessel, and on taking off the process leaving a true copy of it nailed or fixed in its place.

If the cargo has been landed or transhipped, service of the writ of summons or warrant to arrest the cargo and freight has to be effected by placing the writ or warrant for a short time on the cargo, and on taking off the process by leaving a true copy upon it.

With regard, however, to cases where no access to the cargo can be obtained, the rules provide that if the cargo be in the custody of a person who will not permit access to it, service of the writ or warrant may be made upon the custodian <sup>(1)</sup>.

3. *As to the judgment in the action in rem.*—"It is to be borne in mind," said the Court of Appeal in a recent case, "that in the Admiralty Division, in an action *in rem*, the effect of the judgment is greater than it can be in another division of the High Court, where money has been paid into Court. In the one case it is only a judgment between the parties, in the other it is a judgment between the parties and against all the world and cannot be disputed" <sup>(2)</sup>.

Actions *in rem*.

And here in connection with the subject of rights *in rem*, *i.e.* rights against the thing itself, as distinguished from rights *in personam*, *i.e.* rights which only can be asserted against persons, it will be appropriate for us to consider briefly the interesting subject of Maritime lien. Maritime lien has been made the subject of very careful consideration by the House of Lords in very recent times, the last case on the subject to which we shall presently allude again, having been decided in May, 1889 <sup>(3)</sup>; but for our present purpose it will be desirable for us to go back nearly forty years, in order to obtain the clearest and most elaborate statement of the principles of the Court with respect to the "cardinal doctrine" of maritime lien.

Maritime lien.

The great leading case on the doctrine of maritime lien is the case of *Harmer v. Bell. The Bold Buccleugh* <sup>(4)</sup>, decided by the Privy Council in 1851. The facts of the case may be stated with sufficient fulness for our present purpose in a very short compass:

An English vessel had been run down by a Scotch steamer in the Humber. An action was then commenced in the Court of Admiralty in England, by the owners of the English vessel against the owners of the steamer, and a warrant of arrest was issued against the ship, but before the ship could be arrested

<sup>(1)</sup> R. S. C. O. IX. rr. 12, 13, 14.

<sup>(2)</sup> *The Cella*, 13 P. D. 87. See as to judgment *in rem*, Smith's Leading Cases, 9th ed., vol. ii., pp. 825, 838, 865, *et seq.*, 882, *et seq.*

<sup>(3)</sup> *Hamilton v. Baker. The Sara*,

14 App. Cas. 209.

<sup>(4)</sup> *Harmer v. Bell. The Bold Buccleugh*, 7 Moore's Reports, P. C. 267; and see *Re Henrich Björn*, 11 App. Cas. 284, 285, for comments on some points in this case.

she had sailed for Scotland. While in Scotland she was sold to a *bonâ fide* purchaser for value. She subsequently returned within the jurisdiction of the Court and was arrested. The question then arose whether the owner of the damaged ship had a lien on the wrong-doing vessel, or whether his only claim was a personal one against the former owner. The Privy Council decided that the plaintiff had a maritime lien on the ship which prevailed over the purchaser's rights.

Maritime  
lien.

A maritime lien, it was said in the judgment of the Privy Council in this case, does not include or require possession. The word is used in maritime law not in the strict legal sense as requiring possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the civil law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosoever possession it came. Having its origin in this rule of the Civil Law, a maritime lien was well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story explained that process to be a proceeding *in rem*, and added, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches. This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached <sup>(1)</sup>.

A maritime lien, as was pointed out in a previous judgment, cited with approval in the House of Lords in 1889 <sup>(2)</sup>, must be something which adheres to the ship from the time that the facts happened which gave the maritime lien and then continues binding until it is discharged. It commences, and then it continues binding on the ship until it comes to an end. A maritime lien springs into existence the moment the circumstances give birth to it, as damages, salvage, and wages. A claim may, by Act of Parliament, be enforceable against the *res* without being created a maritime lien. In such a case a creditor does not

<sup>(1)</sup> *Hamilton v. Baker, The Sara*,  
14 App. Cas. 209, referring to the  
judgment in *The Two Ellens*, L. R.

4 P. C. 61.

<sup>(2)</sup> *Harmer v. Bell. The Bold*  
*Buccleugh*, 7 Moore's Reports P. C. 267.

obtain the ship or other *res* as a security until he institutes his action. He must arrest the ship, and thereby acquire the *res* as a security. Maritime lien.

The cases on the subject, when taken in conjunction with the statute law, establish that there is a maritime lien in respect of—

- (1.) Damage by collision (*The Bold Buccleugh*, 7 Moore P. C. 267).
- (2.) Salvage, towage and pilotage (see *Henrich Björn*, 11 App. Cas. 270, 282, 283).
- (3.) Bottomry and respondentia bonds.
- (4.) Master's wages (Merchant Shipping Act, 1854, s. 191).
- (5.) Seamen's wages<sup>(1)</sup> and see on this subject *The Immaculata Concezione*, 9 P. D. 37).

There is no maritime lien for necessities, nor in respect of building, equipping, or repairing a vessel. There is also no maritime lien for ordinary towage services in respect of a ship<sup>(2)</sup>. In a case to which we have already referred<sup>(3)</sup>, decided in 1889, the House of Lords held that a master has not, under the Admiralty Court Act, 1861, any maritime lien for disbursements. The Merchant Shipping Act, 1889, which received the royal assent on the 26th of August, 1889<sup>(4)</sup>, and which is to be construed as one with the Merchant Shipping Act, 1854, and the Acts amending it (*ante*, p. 248), now, however, provides, by way of legislative reversal of that decision, that every master of a ship, and every person lawfully acting as master of a ship by reason of the decease or incapacity from illness of the master of the ship, shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as a master of a ship now has for the recovery of his wages; and if in any proceeding in any Court of Admiralty

<sup>(1)</sup> *The Henrich Björn*, 11 App. Cas. 270; *The Two Ellens*, L. R. 4 P. C. 161; *The Rio Triton*, 9 App. Cas. 356; *The Lyons*, 57 L. T. (N.S.) 818.

<sup>(2)</sup> *Westrup v. Great Yarmouth Steam Carrying Co.* 43 Ch. D. 241.

<sup>(3)</sup> *Hamilton v. Baker. The Sara*, 14 App. Cas. 209.

<sup>(4)</sup> 52 & 53 Vict. c. 46. The various maritime liens and charges rank in the following order: (1) Lien for damages; (2) Lien for seaman's wages; (3) Liens for master's wages

and disbursements on ship's account; (4) Liens for salvage, towage, pilotage, and bottomry bonds; (5) Lien for repairs; (6) Solicitor's lien; and it has been decided that this lien will have priority over claims for necessities supplied after the institution of the action, but not over claims for necessities supplied previously: *The Heinrich*, 41 L. J. Ad. 68, and see Newson's Law of Shipping, p. 148 *et seq.* See as to wages earned in port, *The Queen v. The Judge of the City of London Court, &c.*, 25 Q. B. D. 339.

Maritime  
lien.

or Vice-Admiralty, or in any County Court having Admiralty jurisdiction, touching the claim of a master, or any person lawfully acting as master, to wages or such disbursements or liabilities as aforesaid, any right to set-off or counter-claim is set up, it shall be lawful for the Court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due.

The law on the subject of maritime lien has been summed up by the Court of Appeal as follows:—

“There were certain matters over which the Court of Admiralty had jurisdiction, in the sense that there was a maritime lien which the Court could carry into effect by an action *in rem*. There were certain other matters again over which it had not jurisdiction until it was given by Act of Parliament. For instance, the Court never had jurisdiction for necessaries supplied to a ship until it was given by the legislature. On the other hand, the Admiralty Court always had jurisdiction in respect of a collision at sea, whether the vessels were British or foreign. But if a collision occurred within the body of a county, the Court had no jurisdiction. So with regard to seamen's wages, the Court had a jurisdiction by which it could enforce a lien against the ship for wages in respect of an ordinary maritime contract arising from the signing of the articles. But if there was a special contract the Admiralty Court had no jurisdiction in regard to it” (1).

And now having briefly noticed some of the great fundamental principles of Admiralty Law, we may proceed to consider the chief subjects dealt with by the Admiralty Division. These are:—

- I. Damage arising out of collision (*post*, p. 1055).
- II. Salvage (*post*, p. 1068).
- III. Towage and pilotage (*post*, p. 1076).
- IV. Necessaries supplied to a ship (*post*, p. 1078).
- V. Removal of the master (*post*, p. 1080).
- VI. Possession and co-ownership (*post*, p. 1081).
- VII. Mortgage, bottomry and *respondentia* (*post*, pp. 1084, 1089).

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(1) 12 P. D. 158.



## CHAPTER II.

## COLLISION.

Damage caused by collision at sea, is the most important class of business dealt with by the Admiralty Division.

The general principles upon which the Court of Admiralty proceeds in determining how loss occasioned by collision is to be borne, were stated by the celebrated Lord Stowell, then Sir William Scott, in the following terms, which have since been universally accepted, cited with approval in the House of Lords<sup>(1)</sup>, and frequently acted upon by the Courts<sup>(2)</sup>: "There are four possibilities under which an accident of this sort may occur. In the first place it may happen without blame being imputable to either party, as where the loss is occasioned by a storm or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light. Secondly, a misfortune of this kind may arise when both parties are to blame; where there has been a want of due diligence or of skill on both sides; in such a case the rule of law is that the loss must be apportioned between them as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down, and in this case the injured party would be entitled to an entire compensation from the other"<sup>(3)</sup>. But this last proposition, which even then was subject to the qualification that the compensation was limited to the value of the ship which was to blame, must now be read subject to the important modification introduced since Lord Stowell's time by the legislature, viz., that by the Merchant Shipping Act, 1862 (*post*, p. 1057), the liability of the owner of the wrong-doing vessel may be limited to the amount prescribed by the statute.

General principles upon which the Court proceeds.

It was decided by the Court of Appeal, in a well-known

<sup>(1)</sup> *Hay v. Le Neve*, 2 Shaw (Sc.) App. Cas. 395.

<sup>(2)</sup> Marsden on Collision, p. 126, 2nd ed., where the history of the law

on the subject will be found elaborately treated.

<sup>(3)</sup> *Woodrop v. Sims*, 2 Dod. Ad. 85.

case <sup>(1)</sup>, that where one ship has placed another in a position of extreme danger, that other vessel will not be held to blame if she has done something wrong and has not manœuvred with perfect skill and presence of mind: "A ship," said the late Lord Justice James, "has no right by its own misconduct to put another ship into a situation of extreme peril, and then to charge that other ship with misconduct. If in that moment of extreme peril and difficulty, such other ship happens to do something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected. You have no right to expect men to do something more than ordinary men."

Where one vessel was admittedly to blame, but the other might have prevented the collision by altering her helm, the latter was held not to blame, and consequently entitled to damages. "The rule," said the Court, "is that the plaintiff could not recover if his ship were in any degree in fault, in not endeavouring to prevent the collision. Here the plaintiff had a right to presume that the defendant's ship would do that which she ought to do" <sup>(2)</sup>.

Where a steamer (A.) was compelled by the improper navigation of a barge (B.) to alter her course, and came consequently into collision with C., the Court decided that B. was liable for the damage inflicted, and, there being no negligence on the part of C., that that liability remained, though C. by taking another course might have avoided the collision <sup>(3)</sup>.

The collision, said Sir R. Phillimore, was caused by the starboarding of the steamer, the starboarding of the steamer was caused by the improper manœuvre of the *Sisters* in crossing the bows of the steamer, and therefore the real wrong-doer was not the steamer which dealt the blow, but the barge which caused the blow to be dealt.

A very important point arose in a case which came before the Court of Appeal in 1884 upon the meaning of the term "improper navigation." A collision had occurred owing to the bad steering of a steam ship, which was the result of the fact that a screw had been put wrongly or carelessly into the steam steering gear, owing to the negligence of persons on shore who had been employed to superintend the work. The Court of Appeal pro-

<sup>(1)</sup> *The Bywell Castle*, 4 P. D. 219. See *The Tasmania*, 15 App. Cas. 223, and see *The Highgate*, 62 L. T. 841, where the officer in charge was held

to blame.

<sup>(2)</sup> *Vernal v. Gardner*, 1 C. & M. 21.

<sup>(3)</sup> *The Sisters*, 1 P. D. 117.

ceeded on the principle that in the eye of the law an owner improperly navigated his vessel if, owing to the negligence of some one for whom he is responsible, his ship does damage to another. Navigation is the science or art of conducting a ship from place to place through the water, and accordingly includes the supply of such instruments as are proper for the ship, and such men as are properly skilled in their calling <sup>(1)</sup>.

The rule laid down by Lord Stowell (*ante*, p. 1055), that in any case of collision where one party is wholly in fault, the other party shall be entitled to entire compensation, is, as has been already indicated, subject to a very important statutory limitation, which we shall now briefly consider.

The principle of limited liability thus introduced by our statute law is, "that full indemnity, the natural right of justice, shall be abridged for political reasons." Limitation of liability.

By the Merchant Shipping Act, 1862, the owners or master of any ship (British or foreign) liable for a collision occurring without their actual fault or privity, shall not be answerable in damages in respect of loss of life or personal injury, either alone or together, with loss or damage to ships, boats, goods, or other things, to an aggregate amount exceeding £15 for each ton of their ship's tonnage; nor in respect of loss or damage to ships, boats, goods, or other things, whether these be in addition to loss of life or personal injury or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage <sup>(2)</sup>. The tonnage mentioned in the statute is the gross registered tonnage allowing for crew space, but without deduction on account of engine-room.

To obtain the benefit of this statutory limitation of liability under the Merchant Shipping Act of 1862, a British-owned ship must be registered. In a case <sup>(3)</sup> where a newly-built vessel belonging to a natural-born English subject, on being launched, ran into and damaged a passing ship, and the Court had pronounced that the new vessel was solely to blame for the collision, the question arose whether the owner was entitled to a declaration limiting his liability in respect of the damages occasioned by the collision. The Court said that it must be remembered that the limitation of liability was a creature of statute law; that upon general principles of jurisprudence and natural equity, the sufferer was entitled to a *restitutio in integrum* at the hands of the wrong-doer; that it was not a question of

<sup>(1)</sup> *The Warkworth*, 9 P. D. 145, see *The Recepta*, 14 P. D. 131. confirming 9 P. D. 20.

<sup>(2)</sup> *The Andalusian*, 3 P. D. 182.

<sup>(3)</sup> 25 & 26 Vict. c. 63, s. 54; and

Limitation  
of liability.

the launch being liable to a penalty for necessary non-registration, but a question whether she was entitled to a privilege which operated severely upon the sufferer, unless she brought herself strictly within the plain meaning of the provisions of the statute. The decision accordingly was that the owner of the vessel was not entitled to a declaration limiting his liability <sup>(1)</sup>.

This Act applies in every case of collision whether the ships are both British or both foreign, or one British and one foreign; whether the collision occurs in British or in foreign waters, or or on the high seas <sup>(2)</sup>; and whether the action is in Admiralty or at common law <sup>(3)</sup>.

The Court has jurisdiction over both the parties to a collision. Either of them may, if he pleases, abandon or not exercise his right to claim compensation from the other. But when one does institute a suit, the other cannot baffle him by refusing to appear; even though his ship is not within the reach of the Court, the institution of the suit gives a maritime lien against the ship, forming the foundation of an inchoate right to seize the vessel whenever it comes within the reach of the Court, even though in the meantime it had become the property of a *bonâ fide* purchaser without notice <sup>(4)</sup>.

Limitation of liability may be claimed in a defence in which liability for the collision is admitted, or it may be claimed by way of counter-claim; but the usual practice is not to commence an action for the purpose of limiting liability until the main action has been decided. A limitation action is then commenced.

If the required judgment be granted, advertisements are inserted in the newspapers, calling upon persons who may have claims arising from the cause of damage in respect of which the limitation is granted to send in their claims. The usual time for sending in claims is six months, but a shorter period may be fixed by the Court <sup>(5)</sup>.

The lien for the damage done by the collision, attaches not only to the vessel herself, but also to her tackle, sails and rigging; and if the ship be broken into pieces, the lien may

<sup>(1)</sup> The owners of a ship which has been arrested in an action for damages done may alone obtain her release by establishing their right to benefit of the statute, and paying the statutory amount into Court with a sum to cover interest and costs: *The Sisters*, 1 P. D. 281.

<sup>(2)</sup> Marsden on Collision, 173, citing *The Amalia*, 1 Moo. P. C. C.

(N.S.) 471; Br. & Lush. 151.

<sup>(3)</sup> *Chartered Mercantile Bank of India, &c. v. Netherlands Steam Navigation Co.*, 10 Q. B. D. 521.

<sup>(4)</sup> *Per Lord Blackburn in Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co.*, 7 App. Cas. 795.

<sup>(5)</sup> Roscoe's Admiralty Practice, 55.

be enforced against the fragments. The lien also extends to freight, which is regarded as a portion of the *res*, and that although the cargo by which the freight was payable was not on board <sup>(1)</sup>.

The cargo on board a vessel when the collision occurs, even though it is the property of the owner of the vessel, is not, however, liable for the damage done, but it may be arrested and detained, in order to compel the payment of freight due in respect of it <sup>(2)</sup>.

The owner of a vessel sunk at sea by a collision, is under no obligation to raise her, even though it be practicable. If he chooses to raise her, and she turns out not to be worth repairing, he is entitled to recover the cost of raising and docking her, less her then value, viz., the difference between her value and the expense of raising and docking her <sup>(3)</sup>.

The 25th section of the Judicature Act, 1873, provides that :—

In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail <sup>(4)</sup>.

Provision  
in the  
Judicature  
Act, 1873.

The general rule is, that where the defence of compulsory pilotage is set up alone, the Court makes each side pay their own costs; but where the plaintiffs discontinued the action, the Court considered that it had no material on which to exercise its discretion, and that accordingly the plaintiffs must pay the

<sup>(1)</sup> *The Alexander*, 1 Dod. 278; *The Dundee*, 1 Hagg. 104; *The Neptune*, 1 Hagg. 227; and *The Orpheus*, L. R. 3 A. & E. 308.

"The result of the authorities," said the President (in a case which came before him in 1888, *The Tasmania*, 13 P. D. 110), "would appear to me to be this, that the maritime lien resulting from collision is not absolute. It is a *primâ facie* liability of the ship, which may be rebutted by showing that the injury was done by the act of some one not deriving his authority from owners; and that by the maritime law, charterers, in whom the control of the ship has been vested by the owners, are deemed to have derived their authority from the owners, so as to make the ship liable for the negligence of the charterers who are *pro hac vice* owners.

"I draw from these premises the

conclusion that whatever is a good defence of the charterers against the claim of the injured person is a good defence for the ship, as it would have been if the same defence had arisen between the owners and the injured person."

<sup>(2)</sup> *The Victor*, Lush, 72; *The Flora*, L. R. 1 A. & E. 45; *The Roecliff*, L. R. 2 A. & E. 363.

<sup>(3)</sup> Newson's Law of Shipping, cap. xiv. 154, where the authorities are cited.

<sup>(4)</sup> 36 & 37 Vict. c. 66, s. 25, sub-s. 9. The rule in Common Law was that if both ships were to blame, *i.e.* if it were a case of contributory negligence (*ante*, p. 485), neither could recover damages: see the *Chartered Mercantile Bank of India v. The Netherlands Steam Co.*, 10 Q. B. D. 521. See as to case where both ships to blame, *The Arratoon Apar*, 15 App. Cas. 37.

costs. In this case, Butt, J., said: "The Admiralty Court is now merged in a Division of the High Court; it is therefore desirable that, so far as possible, the practice in this Division should be the same as in the other Divisions" (1).

Preliminary Act.

The Judicature Rules provide that in actions *in any Division* for damage by collision between vessels, unless the Court or a judge shall otherwise order, the solicitor for the plaintiff shall, *within seven days after the commencement of the action*, and the solicitor for the defendant shall, *within seven days after appearance*, and before any pleading is delivered, file with the Registrar, Master, or other proper officer, as the case may be, a document, to be called a preliminary act (2), which shall be sealed up and shall not be opened until ordered by the Court or a judge.

The Preliminary Act must contain a statement of the following particulars:—

- (a.) The names of the vessels which came into collision and the names of their masters;
- (b.) The time of the collision;
- (c.) The place of the collision;
- (d.) The direction and force of the wind;
- (e.) The state of the weather;
- (f.) The state and force of the tide;
- (g.) The course and speed of the vessel when the other was first seen;
- (h.) The lights, if any, carried by her;
- (i.) The distance and bearing of the other vessel when first seen;
- (k.) The lights, if any, of the other vessel which were first seen;
- (l.) Whether any light of the other vessel, other than those first seen, came into view before the collision;
- (m.) What measures were taken, and when, to avoid the collision;
- (n.) The parts of each vessel which first came into contact.

The object of the preliminary act is to obtain from the parties statements of the facts at a time when they are fresh in their recollection. Amendment of the preliminary act will therefore not be allowed at the hearing, and accordingly great care should be taken to make it as accurate as possible (3).

(1) *The J. H. Henkes*, 12 P. D. 106; see also *The Monk Seaton*, 14 P. D. 51, where the Court proceeded on the principle that the practice of the other Divisions should be followed; but see *The Isis*, 8 P. D. 227, as to state-

ments of claim in Admiralty actions,

(2) R. S. C. 1883, Order xix., r. 28.

(3) *The Vortigern*, Swa. 518; *The Frankland*, L. R. 3 Ad. 511; *The Miranda*, 7 P. D. 185.

The parties, however, are not bound in their pleadings to repeat any errors or omissions which may exist in their preliminary acts, and it is open to them in their statement of claim, or defence, to state correctly any facts which may have been omitted or erroneously stated in their preliminary acts. Preliminary Act.

The Court or a judge may order the preliminary act to be opened and the evidence to be taken thereon without its being necessary to deliver any pleadings, but except in pressing cases such order will not be made unless both parties consent. In such a case, if either party intends to rely on the defence of compulsory pilotage, he may do so, and shall give notice thereof in writing to the other party, within two days from the opening of the preliminary act.

In the Court of Admiralty the application of the rules is to be made by a mixed tribunal. The tribunal which has to try the case is the judge himself, and the judgment is his and his alone. The assessors who assist the judge take no part in the judgment whatever; they are not responsible for it, and have nothing to do with it. They are there for the purpose of assisting the judge by answering any question, as to the facts which arise, of nautical skill. They have nothing to do with the credibility of witnesses, unless that credibility depends upon a knowledge of nautical affairs specially. They have nothing to do with whether the evidence proves that vessels were at one distance or another at any given time. That is not their function. All that is to be decided upon the responsibility of the judge, and upon the evidence before him, and upon his view of that evidence. But nautical questions may arise in the course of the case, with regard to particular facts of the case, and the judge is entitled to ask the assessors those questions in order to guide him in applying any general rule that may exist to the particular facts before him. Therefore, before such a tribunal, the final question which has to be decided is a question solely for the judge. The judge is bound to give great weight to the opinion of the assessors, but at the same time, if he does not think their view right, he is not bound to follow it <sup>(1)</sup>.

In Admiralty actions *in rem* a warrant for the arrest of property may be issued at the instance either of the plaintiff or of the defendant, at any time after the writ of summons has issued, but no warrant of arrest shall be issued until an affidavit by

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(1) Per Lord Esher, *The Beryl*, 9 P. D. 137, 141.

the party or his agent has been filed, and the provisions specified by the rules complied with <sup>(1)</sup>.

The only points which are decided by the Court in collision actions are: first, whether any damage has been done; and, second, who are or is in fault. The whole case is then sent on reference to the Registrar and skilled merchants to report as to the amount which ought to be paid. The party in whose favour the report is made, then moves in Court for its confirmation.

Damages  
for loss  
of life.

An important case with regard to damages for loss of life arising from collision, came before the House of Lords in 1888. The facts of the case may be briefly stated as follows: A collision had occurred between the steamships *Bushire* and *Bernina*, through the fault or default of the masters and crews of both. And in consequence of this two persons on board the *Bushire*, one of the crew, and a passenger, neither of whom had anything to do with the negligent navigation, were drowned.

An action was then brought in the Admiralty Division by the personal representatives of the deceased persons *in personam* against the owners of the *Bernina* for negligence <sup>(2)</sup>. This action was brought under the well-known Act passed in 1846, known as Lord Campbell's Act, which we have previously considered in connection with the subject of Torts (*ante*, p. 497), which forms the great statutory exception to the general rule of the law, *actio personalis moritur cum persona*, and enables damages for injury done to be recovered by the representatives of a person who has suffered. In a well-known case decided forty years ago <sup>(3)</sup>, the Court had proceeded on the principle that a man who had travelled by an omnibus, had by his selection of that particular conveyance so identified himself with the owner and his servants, that if any injury arose from their negligence he must be considered as a party, and consequently precluded, by the doctrine of contributory negligence (explained, *ante*, p. 485), from recovery against the owners of another omnibus which had negligently inflicted an injury upon him. The House of Lords, however, disagreed with this doctrine, and decided the following points: (1) That the deceased persons were not identified in respect of

<sup>(1)</sup> R. S. C. 1883, Order v., r. 16. The Court or a judge has, however, a discretionary power to allow the warrant to issue, although the affidavit may not contain all the required particulars, and in an action of wages the Court or judge may also waive the service of the notice, and in an action of bottomry the production of the bond.

<sup>(2)</sup> *Mills and Others v. Armstrong and Another. The Bernina*, 13 App. Cas. 1. A third action was brought by the personal representatives of the second officer of the ship who was in charge and whose wrongful act caused the collision, but it was held to be not maintainable, 12 P. D. 58, 84, 85.

<sup>(3)</sup> *Thorogood v. Bryan*, 8 C. B. 115.



the negligence with those navigating the *Bushire*, and that, consequently, their representatives could maintain the actions: (2) A further point of much importance which was also decided was that the representatives could recover the whole of the damages on the ground that the Admiralty Rule as to half damages has no application to actions under Lord Campbell's Act.

It may here be pointed out with regard to actions under Lord Campbell's Act, that it was decided by the House of Lords in 1884, in the case of *The Vera Cruz* <sup>(1)</sup> that the Admiralty Division has no jurisdiction to entertain an action *in rem* for damages for loss of life under that Act.

The duty of standing by and assisting in cases of collision, which first received a statutory recognition in a section introduced by Lord Kingsdown into the Merchant Shipping Act, 1862, <sup>(2)</sup> is now dealt with by 36 & 37 Vict. c. 85 <sup>(3)</sup>, as follows:

Duty of  
"standing  
by."

"In every case of collision between two vessels, it shall be the duty of the master or person in charge of each ship, if, and so far as he can do so without danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew and passengers (if any), such assistance as may be practicable, and as may be necessary in order to save them from any danger caused by the collision; and also to give to the master or person in charge of the other vessel the name of his own vessel, and of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound. If he fails to do so, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default." The section also provides that failure, without reasonable cause, to render the assistance and give the information prescribed by the statute, shall be a misdemeanor, and that the offence, if committed by a certificated officer, may be made the subject of inquiry, and punished with cancellation or suspension of certificate <sup>(4)</sup>.

The following is a summary of the principal requirements of the Regulations for Preventing Collisions at Sea, which came into operation on the 1st of September, 1884:—

Regulations for  
preventing  
collisions  
at sea.

I. *Lights*.—Sailing-vessels under way are required to carry, from sunset to sunrise, a green light on the starboard side and a

<sup>(1)</sup> 10 App. Cas. 59.

<sup>(2)</sup> 25 & 26 Vict. c. 63, s. 33.

<sup>(3)</sup> Sect. 16.

<sup>(4)</sup> *The Hannibal*, *The Queen*, 2 A. & E. 53, 55.

Regulations for preventing collisions at sea.

red light on the port side. Steamers are required, in addition, to carry a white light at the mast-head. When a steamer is towing another vessel she must carry an additional white light at the mast-head. A vessel not under control must carry at the mast-head, in place of the white light, three red lights, one above the other, by night, and three black balls by day. It is not necessary for small vessels, in bad weather, to carry fixed side-lights, but they must have coloured lanterns ready for emergency. There are also special regulations for open boats and fishing-boats engaged in fishing. Every vessel at anchor must carry a white light at a height not exceeding twenty feet above the hull in the prescribed manner. A steamship which is under sail and not under steam must carry the same lights as a sailing ship.

II. *Fog Signals*.—Sailing vessels are required to carry a bell and a mechanical fog-horn, and steamers must have in addition a steam-whistle for use in fog, mist, or falling snow. The horn or whistle is to be blown at intervals of two minutes, and, in the case of a sailing vessel, must be so blown as to indicate the course she is taking; three blasts in succession meaning that she has the wind abaft the beam; two blasts that she is on the port tack; and one blast that she is on the starboard tack <sup>(1)</sup>.

In fog or snow a vessel must further go at a moderate rate of speed, and when not under way must ring her bell at the stated intervals. What is a moderate rate of speed depends entirely on the circumstances of each case.

III. *Conduct*.—When two sailing vessels are approaching one another so as to involve risk of collision, the general rule is that a vessel on the port tack gives way to a vessel on the starboard tack. But a vessel running free is obliged to keep clear of a vessel close hauled, and a vessel with the wind aft must keep out of the way of the other vessel whatever her course may be. In the case of steamships the rules are different. A steamer must always keep out of the way of a sailing vessel, with this exception, that an overtaking vessel, whether under sail or steam, must keep clear of the vessel overtaken. Two steamers meeting end on must each port their helms so that they pass each leaving the other on the port hand. When two steamers are crossing one another, the vessel which has the other on her starboard hand shall keep out of the way of the other <sup>(2)</sup>.

<sup>(1)</sup> *The Constantia*, 38 W. R. 272.

<sup>(2)</sup> These rules are set out in full, L. R. 9 P. D. p. 247. In these rules every steamship which is under sail and not under steam is to be con-

sidered a sailing ship, and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

In all these cases the vessel which has not to give way shall keep her course. Steamers are required (Art. 18), when there is a risk of collision, to slacken their speed and, if necessary, stop and reverse. A steamer may indicate any alteration in her course by means of her whistle; thus, one short blast means, "I am directing my course to starboard;" two short blasts, "I am directing my course to port;" three short blasts, "I am going full speed astern."

In a recent case of much importance on the subject of collision, the principle was laid down that where vessels, whether steamers or sailing-vessels, find themselves in a fog, they must be held strictly to the regulations for preventing collisions at sea <sup>(1)</sup>. Vessels in  
a fog.

In this case the ship *Dordogne* got into a dense fog off Ushant, and whilst proceeding at slow speed she heard a whistle repeated several times, and answered it. About a quarter of an hour after the first sound the steamship *Edith* appeared about a length from the *Dordogne*, and although the engines of the latter were reversed full speed, a serious collision occurred. The Court considered that the present case fell within the principle well expressed in a judgment in a previous case, which was affirmed by the Privy Council: "Both vessels were going, in truth, in the most absolute uncertainty as to the proceedings of the other, and in such a state of circumstances I have had to ask myself this question—could anything have been done to avoid this collision which was not done? And the opinion of the Court, fortified by that of its nautical assessors, is that on hearing the whistles of each other so near, and approaching each other, each vessel ought, not only to have stopped, but to have reversed until its way was stopped, when it could have hailed and ascertained with certainty which way the head of the other vessel was, and which way she was proceeding, and by that means the collision would, or might have been avoided."

It must be borne in mind, that as was pointed out by the Court of Appeal, the regulations are made not merely for the purpose of preventing collisions, but of preventing danger of collision, and vessels must be judged, not by proof of what turned out to be the actual facts, but by what ought to have appeared to be the facts, under the circumstances in which he was placed, to an officer of reasonable care and skill <sup>(2)</sup>.

In narrow channels steamers are to keep on that side of the channel which lies on their starboard hand. Art. 23 contains

(1) *The Dordogne*, 10 P. D. 6; see also *The Ceto*, 14 P. B. 670, and as to alteration of helm, *The Vindomora*, 14 P. D. 172, affirmed by House of Lords, W. N., 1890, p. 212.

(2) *The Beryl*, 9 P. D. 134.

a general provision that in obeying and construing the rules, due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from them necessary in order to avoid immediate danger.

Liability of  
"wrong-  
doing"  
ship.

A ship is often figuratively spoken of as a wrong-doer, but it must be borne in mind that in all causes of action which may arise from circumstances occurring during the ownership of the persons whose ship is proceeded against, "no action can be maintained against a ship where the owners are not themselves personally liable, or where their personal liability has not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability of the ship and the responsibility of the owners in such cases are convertible terms; the ship is not liable if the owners are not responsible, and *vice versâ*, no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against." (1)

The result of the decisions, said the President in a case decided in 1888, is, that though a ship is commonly spoken of metaphorically as if it were itself capable of doing a wrong, it is an instrument in the hands of its navigators, and its liability will depend on whether those navigators can be identified with the owners or their agents (2).

The 17th section of the Merchant Shipping Act, 1873, enacts that "if, in any case of collision, it is proved to the Court before which the case is tried, that any regulation for preventing collisions, contained in, or made under, the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

What is the meaning of these words when read in connection with the regulation? This problem was made the subject of very careful consideration in two cases, one of which came before the House of Lords in 1880, and the other before the Court of Appeal in 1883.

The case in the House of Lords decided that it is no answer for a master of a ship to say that he has acted from the best of motives and according to the best of his ideas; his duty is to obey the regulations. But the case in the Court of Appeal decided that when an implicit obedience to Art. 18, which orders the master to slacken, or stop, or reverse, would lead to certain destruction, and when the only chance of collision was to keep

(1) *The Druid*, 1 W. Rob. 391.

(2) *The Tasmania*, 13 P. D. 115, citing the judgment in *The Druid*, 1 W. Rob. 391.

on at full speed and starboard the helm, the master was justified in adopting the latter course. Unless, said Lord Justice Bowen, some reasonable force is given to Article 23, and to the exception it contains, a captain will have to sail with his eyes open into the jaws of death. If he obeys Article 18, let us assume that it is certain death for passengers and crew, that he has only one chance still open to him, and that is by disobeying the particular rule. Such a case would surely be one in which a departure from the rules becomes necessary, otherwise a captain's duty would be to obey Article 18, and go cheerfully to the bottom of the sea with his ship and all on board sooner than take the one chance of safety still remaining to him. Such an interpretation of the regulations was never, in my opinion, intended by the House of Lords. I am of opinion that a departure from Article 18 is justified when such departure is the one chance still left of avoiding danger which otherwise was inevitable <sup>(1)</sup>.

Departure  
from regu-  
lations  
when  
justified.

An interesting point was decided in a case where a ship came into collision with two other vessels, one after the other, without loss of life, and there was only a short interval either of space or time between the two collisions. The Court being of opinion that the first collision was the substantial and efficacious cause of the second, and that there was no separate act of negligence on the part of those in charge of the plaintiff's ship in respect of the second collision, allowed the owner to limit his liability. <sup>(2)</sup>

Damages in respect of the loss of market in consequence of delay in the arrival of the goods were held to be too remote. The reason given by the Court was that loss of market in the sense that persons are entitled to the difference between the price when the goods arrived and the price when they ought to have arrived, is on an ordinary voyage so uncertain that it cannot be the natural and reasonable consequence in every case, and therefore it is not the natural and reasonable result of a collision at sea <sup>(3)</sup>.

Damages  
too remote.

The following recent cases may be consulted as to liability for collision: *The Talabot*, 15 P. D. 194; *The Warwick*, 15 P. D. 189; *The Magneta*, 15 P. D. 101; *The Duke of Buccleuch*, 15 P. D. 86; (and see *The Hermoa*, 62 L. T. 670); *The Stakesby*, 15 P. D. 166; *The Schwan*, 61 L. T. 308; *The Earl of Wemyss*, 61 L. T. 289; *Liverpool, Brazil and River Plate Steamship Co. v. Campanhia Bahiana de Navigacio a Vapor*, 62 L. T. 84.

<sup>(1)</sup> *The Khedive*, 5 App. Cas. 876; 113. See *The City of Lincoln*, 15 P. D. 15; *The City of Peking*, 15 App. Cas. 483.

<sup>(2)</sup> *The Creadon*, 54 L. T. 880.

<sup>(3)</sup> *The Notting Hill*, 9 P. Div. 105,

## CHAPTER III.

## SALVAGE.

Definition  
of salvage.

Salvage is a compensation for maritime services, rendered in saving property or rescuing it from impending peril on the sea, or when wrecked on the coast of the sea, or on a public navigable river or lake, where inter-state or foreign commerce is carried on. The amount of the compensation rests in the sound discretion of the Court, upon a full consideration of all the facts of the case <sup>(1)</sup>.

"With regard to salvage," said Lord Justice Bowen, in a case decided in 1886, "the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law for the purposes of public policy and for the advantage of trade imposed in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea <sup>(2)</sup>."

The principle upon which the Court proceeds is that salvage remuneration should not be a mere remuneration *pro opere et labore*, i.e. for work and labour, but that on principles of public policy such remuneration should be allowed as will encourage others to render like services. On the other hand, as has been well said, while it is the policy of the law to encourage the rendition of salvage services by liberal rewards, it is equally its policy "not to provoke the salvor's appetite of avarice, nor teach him to stand ready to devour what the ocean has spared" <sup>(3)</sup>.

The ingredients of a salvage service are, first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow-

(1) See, on the law of salvage generally, Newson's Law of Salvage, Towage, and Pilotage, chaps. 1-13.

(2) *Falcke v. Scottish Imperial Co.*, 34 Ch. D. 294.

(3) "Salvage is the compensation

made to those by whose assistance a ship or its cargo has been saved from impending peril, or recovered from actual loss;" per Lindley, L.J., *The City of Chester*, 9 F. D. 201.

creatures and the property of others; secondly, the degree of danger and distress from which the property is rescued, whether it were in imminent peril, and almost certainly lost, if not at the time rescued and preserved; thirdly, the degree of labour and skill which the salvors incur and display, and the time occupied; lastly, the value. Where all these circumstances concur, a large and liberal reward ought to be given, but where none or scarcely any take place, the compensation can hardly be denominated a salvage compensation—it is little more than a mere remuneration *pro opere et labore*.

The general principles governing the determination of questions of salvage were very carefully considered in a recent case <sup>(1)</sup>, where the authorities were discussed, and the law summed up by Lord Justice Lindley, as follows: “The judge is bound to consider, not only the circumstances of loss having been incurred by the salvor, but in conjunction with it all the other circumstances which enter into the problem of what in the particular case is a reasonable and between the parties an equitable amount of salvage reward. There is, said the Court, as has repeatedly been enunciated by Lord Stowell and other judges, no jurisdiction which is so much at large as the jurisdiction given to award salvage. There is no jurisdiction known in which so many circumstances, including many beyond the circumstances of the particular case, are to be considered for the purpose of deciding the amount of salvage reward.”

General principles as to salvage.

The first matter for consideration is the *nature of the service rendered*, the danger from which the one ship has been saved, and the danger to which the other ship has been exposed. Under this head have to be considered the skill and courage of the salvors, and the risk of life and death as well to the saved as to their rescuers. A salvage service which hardly exceeds ordinary towage is naturally remunerated on a very different scale from an heroic rescue from imminent destruction. On this principle, the possibility of another vessel's assistance being obtained tends to lessen the salvage reward. If two masters were bargaining as to payment for salvage services, the possibility of obtaining other assistance would induce the proposed salvor to offer reasonable terms. The Court also must take this possibility into consideration <sup>(2)</sup>.

The next matter for consideration, according to Lord Justice

<sup>(1)</sup> *The City of Chester*, 9 P. D. 182, 202. See as to cases where salvage was or was not allowed, *The Coriolanus*, 15 P. D. 103; *The Mark Lane*,

15 P. D. 135; *The Five Steel Barges*, 15 P. D. 142.

<sup>(2)</sup> Per The President, *The Werra*, 12 P. D. 52, 54.

General  
principles  
as to  
salvage.

Lindley, is *the value of the property saved*. It was, however, pointed out by the President in a subsequent case, that this is in one sense the first thing to be considered, not because it is absolutely the most important, but because it is the subject-matter in respect of which the action arises. It is the fund which has to be dealt with, and to be divided between the owners and the salvors who have acquired a claim upon it. The primary object of saving a ship and her cargo from loss is to preserve them for their owners, and this object would be defeated if the remuneration awarded to the salvors were so large as to deprive the owners of the saved ship and cargo of all benefit from their preservation. This consideration at once limits the amount of the salvors' remuneration; for however meritorious their services, salvors are never awarded such a sum as to make those services useless to those who have to pay for them. The value of the ship and cargo saved is therefore always one element, and a very important element, in considering the amount to be awarded to the salvors. There is not, however, any definite rule either as to the proportion of value to be given to the salvors or as to the proportion to be left for the owners of the property saved. The risk of getting little by reason of the comparatively small value of the property saved is one of those risks which salvors always run <sup>(1)</sup>.

Another circumstance which has to be taken into consideration is the risk salvors always run of getting nothing at all by reason of the failure of their efforts to save. However strenuous those efforts, however heroic, still if unsuccessful, they go unrewarded. They have not in the result benefited the owners of the ship or cargo, and there is nothing preserved out of which remuneration can be paid <sup>(2)</sup>.

Another circumstance to be considered is the importance of so remunerating salvors as to make it worth their while to succour ships in distress. This consideration renders it necessary to be liberal, not only to captains and crews who perform the salvage services, but also to the owners of vessels engaged in those services, where such vessels have been injured or exposed to danger <sup>(3)</sup>.

(1) 9 P. D. 202.

(2) 9 P. D. 202, 203.

(3) *The City of Chester*, 9 P. D. 182. In this case the Court considered what the law would be, supposing that the danger to the things saved was small, and that by accident the property of the salvor was greatly

injured, and pointed out that the danger of an injury to property, so large as to make it wrong on the equities of the case to place the whole consequences of such injury on the owner of the property saved, was one of the risks which is run by all salvors.



The principle upon which apportionment of salvage money is generally based, where the substantial service was performed by the ship herself, as distinguished from personal services rendered by the crew, as, for instance, where a steamship has towed a vessel in peril to a place of safety, is this: The owners of the salving vessel receive from two-thirds to three-fourths, according to the amount of services that have been rendered by the ship and the crew. The remainder is divided in the following proportion: one-third to the master and two-thirds to the crew, according to their rating <sup>(1)</sup>.

Apportion-  
ment of  
salvage.

Certain persons who ordinarily hold themselves out for employment by ships are not entitled to salvage when the work actually performed by them is substantially that which is within the ordinary scope of their employment. Within this category come pilots and the owners and crews of tugs. Seamen can never earn salvage for rescuing their own ship, as it is obviously part of their duty to "abide by" the ship in her misfortune and protect her in foul as well as fair weather. They have, however, been allowed salvage when they were employed to save cargo after the ship had been lost.

Another class of persons who cannot ordinarily obtain salvage remuneration against the ship in which they are carried are passengers, the reason being that they have no duty compelling them to stand by the ship when she arrives in safety, and up to this time their exertions are practically for themselves. Passengers may, however, be entitled to salvage remuneration for rendering service, *e.g.*, if they recapture a ship or save a ship abandoned by the master and some of the crew <sup>(2)</sup>.

Another class of persons who have only a modified right are the officers and crew of a man-of-war, who have to obtain special leave from the Admiralty to sue with regard to salvage by Her Majesty's ships. The Merchant Shipping Act, 1854, s. 484, provides that, "in cases where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be made or allowed for any loss, damage, or risk thereby caused to such ship or to the stores, tackle, or furniture thereof, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect such services, or for any other expense or loss sustained by Her Majesty by reason of such services."

The question whether pilots are entitled to be remunerated

(1) See further as to apportionment, Newson's Law of Salvage, &c., ch. xi., pp. 91-98.

(2) *The Two Friends*, 1 Robs. 271; *Newman v. Walters*, 3 B. & P. 612.

for salvage service is very carefully considered in an important case <sup>(1)</sup>, where the vessel, being in extreme peril, some pilots, seeing her danger, put off to sea at the peril of their lives, and, though unable to board her by reason of the height of the sea, by preceding her and signalling to her, guided her to a safe anchorage. The Court of Appeal decided that though the vessel had sustained no damage, the pilots were entitled to be remunerated as for salvage services.

Pilots.

The claims of salvors and pilots, said Dr. Lushington, stand on different grounds, and their services are paid for on different principles. A pilot is entitled to what may be deemed a *quasi* monopoly. If there be one on the coast, he must be employed. A pilot has no right to be engaged in any other occupation, and he is paid, not in conformity with the nature of the service which he performs, but in conformity with the vessel's draught. On the other hand, there is no legal obligation on salvors to go on board a ship in distress, and they are entitled to be paid for their services not only as pilots, but also for any loss they may sustain in the employment of the ship <sup>(2)</sup>.

The great fundamental rule of administration of maritime law, said the Court of Appeal, in all Courts of maritime jurisdiction is, that whenever the Court is called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the Court will try to discover what in the widest sense of the term is under the particular circumstances of the particular case fair and just between the parties.

In the case, therefore, of pilots claiming salvage reward, the ultimate proposition with regard to the pilots to be determined by the tribunal, which has to decide between the pilot and the shipowner, is, would a fair and reasonable owner and a fair and reasonable pilot, if they had to agree, have agreed under the circumstances, that the services to be performed should be performed for ordinary pilotage fees, or even extraordinary pilotage reward, or for salvage reward? would a fair owner have insisted on requiring the necessary services for ordinary pilotage fees, or even a higher rate of pilotage payment? would a fair pilot have refused to perform the necessary services unless upon the

<sup>(1)</sup> *Akerblom v. Price*, 7 Q. B. D. 129, 132.

<sup>(2)</sup> *The Cumberland*, 9 Jurist, 191.

terms of a salvage reward. Mere trifling services, however, by a pilot by taking a turn at the wheel, and giving a hand at the windlass, were held not to entitle him to salvage remuneration <sup>(1)</sup>.

An interesting question arose in a case which was decided by Sir Robert Phillimore in 1881. Four steam tugs had rendered salvage services to a sinking vessel by towing her with her passengers, cargo and bullion (£50,000 *in specie*) on board into safety <sup>(2)</sup>. Attention was drawn to a case in which Dr. Lushington had said that with respect to silver and bullion a distinction had been wisely and properly admitted, and that upon the consideration that they were more easily rescued and preserved than more bulky articles of merchandise. And it was further urged that bullion was merely exposed to the danger of sinking, when it could easily be recovered by divers. The Court, however, decided that the bullion was liable to contribute to the salvage reward in proportion to its value ratably with the other property saved. Sir Robert Phillimore, in delivering judgment, said: "It appears to me that the Court would be involved in great difficulty if it admitted any other principle in salvage cases than that every description of property saved must, whatever be its nature, contribute equally in proportion to its value towards payment of the amount of salvage remuneration awarded."

Salvage in respect of *specie*.

A principle which has been applied by the Courts in a great many salvage cases, and which was described by a learned judge as one of considerable importance to the interests of commerce and navigation, is this: "that where a vessel makes a signal of distress and another goes out with a *bonâ fide* intention of assisting that distress, and, as far as she can, does so, and some accident occurs which prevents her services being as effectual as she intended them to be, and no blame attaches to her, the vessel which has thus striven to render assistance ought not to go wholly unrewarded" <sup>(3)</sup>. This principle is applicable not only to cases where a vessel is saved from imminent danger of wreck, but also to cases where the saved vessel is brought into a position of greater comparative safety than that in which she was when she asked for assistance <sup>(4)</sup>.

Signals of distress.

One of the principles on which, as we have seen, the Court

<sup>(1)</sup> *The Monarch*, 12 P. D. 5. In this case it was also decided that a compromise of a salvage action agreed to by the salvors in a mistake of fact is not binding upon them.

<sup>(2)</sup> *The Longfold*, 6 P. D. 60.

<sup>(3)</sup> By Sir Robert Phillimore in *The Melpomene*, 4 Ad. & E. 129.

<sup>(4)</sup> *The Camelia*, 9 P. D. 27, where the authorities are reviewed.

proceeds (subject to the exception mentioned in the preceding paragraph) in awarding salvage, is that the efforts of those who claim salvage must have been to some extent successful. Accordingly, though every other element be present which would entitle the claimants to salvage reward, yet, unless their efforts have conferred some benefit, there cannot be any remuneration. This principle is well illustrated by a case decided in 1885.

The *Cheerful* on a voyage from London to Liverpool broke down in the English Channel, about ten miles from Anvil Point, and was then in a position of some risk, but not of any imminent danger. The *City of Hamburg*, at the request of the *Cheerful*, took her in tow; near the Shambles lightship the hawsers parted, and the *Cheerful* was finally, when the *City of Hamburg* left her, in a position of greater danger than when she was taken in tow. The question which the Court had to decide was whether, under the circumstances, the owners, master, and crew of the *City of Hamburg* were entitled to salvage remuneration. The judge, after stating the facts, proceeded as follows: "I am reluctant to decide such a case as this against the salvors, but I feel constrained to abide by what, in my opinion, is the law which has been laid down in the authorities on this question. I must hold, to quote the language of Dr. Lushington, in *The India*, that, 'unless the salvors by their services conferred actual benefit on the salvaged property, they are not entitled to salvage remuneration.' It follows from what I have said that no actual benefit was conferred on this vessel by the services rendered by the *City of Hamburg*, because the *Cheerful* was left in a position of greater danger than she occupied before those services." The decision of the Court accordingly was that the *City of Hamburg* was not entitled to salvage <sup>(1)</sup>.

Preservation  
of life.

The Merchant Shipping Act provides that "Salvage in respect of the preservation of the life or lives of any person or persons belonging to a ship or boat, shall be payable by the owners of the ship or boat in priority to all other claims for salvage" <sup>(2)</sup>.

It must, however, be borne in mind that there can be no claim for salvage services against a person; something must be saved to which the claim can attach" <sup>(3)</sup>.

There must be something saved more than life, which will form a fund from which salvage may be paid. For the saving

(1) *The Cheerful*, 11 P. D. 3.

(2) 17 & 18 Vict. c. 104, s. 459.

(3) *The Annie*, 12 P. D. 50.

of life alone, without the saving of ship, freight, or cargo, salvage is not recoverable in the Admiralty Court. Life salvage, it is true, may by statute be payable under some such circumstances, but then it must be paid by the Board of Trade <sup>(1)</sup>.

Wilful or criminal misconduct of salvors may work a forfeiture of salvage, but mere misconduct other than criminal misconduct, even though it occasions loss, will only work a diminution of reward. Thus it was decided that violent and overbearing conduct on the part of the salvors, although it may not amount to such wilful misconduct as to cause an entire forfeiture of salvage reward, yet may operate to induce the Court to diminish the amount of the reward <sup>(2)</sup>.

The amount of the salvage remuneration is considered to be almost wholly in the discretion of the judge, and accordingly a rule was laid down by the Privy Council, and is followed by the Court of Appeal, viz. that when an appeal is brought against the amount of salvage awarded in the Admiralty Court it is to be dismissed, unless the judge has acted on wrong principles or under a misapprehension of the facts and has awarded an absolutely exorbitant or unreasonable sum <sup>(3)</sup>.

Forfeiture  
of salvage.

Amount of  
salvage.

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<sup>(1)</sup> *The Renpor*, 8 P. D. 115.

<sup>(2)</sup> *The Marie*, 7 P. D. 203.

<sup>(3)</sup> *The Lancaster*, 9 P. D. 14.

## CHAPTER IV.

## TOWAGE AND PILOTAGE.

Principle  
of the law.

In ordinary contracts of towage, the vessel in tow has control over the tug, and, accordingly the tow is liable for the wrongful acts of the tug <sup>(1)</sup>. The principle on which the Court proceeds is, that it is essential to the safety of vessels being towed that there should not be a divided command, and convenience has established that the undivided authority shall belong to the tow, and that the tug shall be deemed her servant.

“The law implies an engagement that each vessel will perform its duty in completing it; that proper skill and diligence will be used on board of each; that neither vessel, by neglect or misconduct, will create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If in the course of the performance of this contract any inevitable accident happened to the one, without any default on the part of the other, no cause of action would arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the damaged ship had not by any misconduct or unskilfulness on her part contributed to the accident.”

The root of the exemption, said Sir Robert Phillimore <sup>(2)</sup>, in the case of compulsory pilotage is that the pilot is not the servant of the owner of the towed ship, but a person forced upon him by the statute: but the relation of the owner of the ship to the tug is very different. The tug is his servant voluntarily taken and employed by him for the occasion. The law implies, when the tug is employed, a contract between the owner or master of the tug and the owner of the ship to the effect that the tug will obey the directions of the shipowner and act as his servant; but this contract does not affect third parties, and the

<sup>(1)</sup> See *The Quickstep*, 15 P. D. Newell, 25 Q. B. D. 335.

196, and as to towing barges into dock on the River Thames: *Rolls v.* <sup>(2)</sup> *The Mary*, 5 P. D. 14, 16.

principle which exonerates the ship in the case of the pilot does not apply to the tug <sup>(1)</sup>. Position of pilot.

A pilot when in charge of a ship is, as a general rule, considered to be her commander. The master will not be justified in interfering with him, unless the pilot prove incompetent to discharge his office. His orders must be implicitly obeyed. The master and crew are bound to assist him by keeping a sufficient look-out, so as to give him the earliest possible information as to approaching vessels, &c. Should they not do so, the owners will be liable for any damage, although the pilot were also to blame.

A collision occasioned in consequence of the master or crew not obeying the pilot's orders will make the owners liable. It follows that if the engines are not stopped or reversed, or the helm shifted, or the anchor let go, at once, at the pilot's order, the owners will be liable for any collision resulting therefrom.

The trim of a ship, however, is within the province of the master. Where, therefore, a collision is occasioned by the ship not being in ordinary safe trim, the owners will be liable, though a pilot be in charge of the ship. Where the ship is in ordinary safe trim, the owners will not be liable, although the ship might have been in handier trim, and although the trim contributed to the collision <sup>(2)</sup>.

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<sup>(1)</sup> See also as to towage Newson's Law of Salvage, Towage, and Pilotage, chap. xv.; *The Julia*, Lush. 224; *The Undaunted*, 11 P. D. 46; *The Niobe*, 13 P. D. 55. The county court has jurisdiction in cases of breach of towage contract: *The Isca*, 12 P. D. 34.

<sup>(2)</sup> See further, as to the law re-

lating to pilotage and pilots, Newson's Law of Salvage, Towage, and Pilotage, chaps. xvi. to xix. inclusive, and see as to compulsory pilotage: *The Ruby*, 15 P. D. 139, 164. There is no maritime lien in respect of ordinary towage services: *Westrup v. Great Yarmouth Steam Carrying Co.*, 43 Ch. D. 241.

## CHAPTER V.

## NECESSARIES.

The jurisdiction of the Admiralty Division in respect of necessities depends upon certain statutes passed in the present reign.

Jurisdiction.

Independently of statute the Court of Admiralty had no jurisdiction to entertain a suit for necessities.<sup>(1)</sup> By 3 & 4 Vict. c. 65, s. 6, jurisdiction was given to the Court of Admiralty to decide claims for necessities supplied to any foreign ship or seagoing vessels, whether such ship or vessel might have been within the body of a county or upon the high seas, at the time when the necessities were furnished in respect of which such claim is made. That statute, however, only applied to foreign vessels<sup>(2)</sup>. By s. 5 of the Admiralty Court Act, 1861 (24 Vict. c. 10), it is enacted that the Court of Admiralty shall have jurisdiction over any claims for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales. This section applies to British ships only<sup>(3)</sup>.

The term "necessaries" includes all articles suitable or necessary for the ship to prosecute her voyage<sup>(4)</sup>. Thus, coals, screw-propeller, pilotage, towage, cable, anchors, money expended for maintaining the crew, and even money advanced to pay a debt incurred for necessities (when the Court was satisfied that the money had been *bonâ fide* advanced for this purpose), have been held to be included within it. The articles needed must be reasonably necessary at the time and under existing circumstances.

"The expression 'necessaries supplied,' " said Sir James Hannen, in a well-known case, "though it is not to be restricted

<sup>(1)</sup> *The Neptune*, 3 Hagg. Ad. 129, on appeal 3 Knapp, 94; *The Pacific*, B. & L. 243.

<sup>(2)</sup> *The Ocean Queen*, 1 W. Rob. 457.

<sup>(3)</sup> Per judgment of Manisty and

Bowen, JJ., in *Allen v. Garbutt*, 6 Q. B. D. 165.

<sup>(4)</sup> See the authorities collected in Newson's Dig., p. 147 *et seq.*; Bruce's Admiralty, p. 178 *et seq.*



to things absolutely and immediately necessary for a ship in order to put out to sea, must still be confined to things directly belonging to the ship's equipment necessary at the time, and under the then existing circumstances, for the services in which the ship is engaged" <sup>(1)</sup>.

Position of  
managing  
owner.

The general rule of the law on the question whether the managing owner has power to bind the other owners for necessities has been well summed up as follows:—

The law relating to the position and liabilities of registered owners of ships is tolerably clear. Shipowners, to begin with, are not necessarily partners. An owner's liability or non-liability for necessities supplied to a ship depends on the question whether the person who gave the order had his authority to give it. The register, no doubt, is evidence of ownership of the vessel, and the registered owner, until the contrary is shown, may be presumed to be the employer of those who have the custody of her, and who are engaged in her navigation. But a part owner, whether registered or not, has no power to bind the other owners without their assent. The question in each case is one of fact, whether he has had such authority committed to him, or, if this is not in fact the case, whether he has been allowed to hold himself out as armed with such apparent authority.

There is no magic in the term "managing owner" which creates him a plenipotentiary for those owners whose agent he is not in fact <sup>(2)</sup>.

The County Court Admiralty Jurisdiction Act, 1868 <sup>(3)</sup>, confers jurisdiction in respect of any claim for necessities upon the Passage Court of Liverpool, the City of London Court, and the other Courts which have Admiralty jurisdiction under it: (a) in any cause in which the amount claimed does not exceed £150; (b) in any cause where the amount claimed exceeds £150, when the parties agree by a memorandum signed by them or their attorneys or agents that the Court shall have jurisdiction.

The jurisdiction, however, so conferred upon these inferior Courts is only the same as that possessed by the Admiralty Division of the High Court, and consequently they cannot entertain an action for necessities supplied to a British ship the owners of which are domiciled in Great Britain <sup>(4)</sup>.

<sup>(1)</sup> *The Henrich Björn*, 8 P. D. 151.

<sup>(3)</sup> 31 & 32 Vict. c. 71.

<sup>(2)</sup> *Frazer v. Culbertson*, 6 Q. B. D. 98.

<sup>(4)</sup> *Allen v. Garbutt*, 6 Q. B. D. 165.

## CHAPTER VI.

## REMOVAL OF MASTER.

An action may be instituted in the Admiralty Division for the purpose of obtaining possession of a ship against a master who seeks to retain it. If the master is not a part-owner, a declaration by the majority of owners against his continuing in possession is sufficient for the Court. Where the master is a part-owner, some special reason for his removal is usually assigned, but the Court will generally grant an application for his removal if made by a majority of the owners <sup>(1)</sup>.

The Merchant Shipping Act empowers all Courts having Admiralty jurisdiction in any of Her Majesty's dominions to remove the master upon application by the owner of any ship being within the jurisdiction of the Court, or by the part-owner or consignee, or by the agent of the owner, or by any certificated mate, or by one third or more of the crew of such ship and upon proof on oath to the satisfaction of such Court that the removal of the master of such ship is necessary <sup>(2)</sup>.

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<sup>(1)</sup> *The Kent*, Lush, 495.

<sup>(2)</sup> 17 & 18 Vict. c. 104, s. 240.

## CHAPTER VII.

## POSSESSION AND CO-OWNERSHIP.

The jurisdiction of the Court in questions of possession between co-owners depends upon section 8 of the Admiralty Act, 1861, which provides that the High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit. Jurisdiction.

Where a vessel belongs to several co-owners they generally elect one of their number to manage it exclusively. The owner so elected is termed the *ship's husband*, or managing owner. The name and address of a ship's husband or managing owner must be registered at the custom-house of the ship's port of registry. Ship's husband.

Each part-owner of a ship is liable as a partner for the full amount of the expenses incurred on its account, unless he can show that such expenses were not incurred on his own credit<sup>(1)</sup>.

It has been pointed out by a well-known authority that the law of England in general declines to interfere in the disputes of co-owners, leaving it to themselves either to enjoy their common property by agreement, or to suffer it to remain unenjoyed or perish by their dissension. But with regard to ships, "which are built to plough the sea, and not to lie by the walls," the law of England, like that of other commercial nations, regards their actual employment as a matter of public policy, and takes care "to prevent the obstinacy of some of the part-owners from condemning the ship to rot in idleness<sup>(2)</sup>."

The laws of England, however, differ from those of other

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(1) *Frazer v. Cuthbertson*, 6 Q. B. D. 93, *ante*, p. 1029.

(2) *Abbott on Shipping*, p. 58.

countries in that, while authorizing the majority in value to employ the ship "upon any probable design," they take care to secure the interest of the dissentient minority from being lost in the employment of which they disapprove.

The Admiralty Division has "a special jurisdiction in cases of disagreement among co-owners of a ship to prevent the obstinacy of some of the owners damaging the rights and interests of the rest" (1).

Action of  
restraint.

A part-owner holding a minority of shares in a vessel is entitled to institute an action of restraint and arrest the vessel; and the Court is bound, on sufficient proof being adduced, that the plaintiff objects to the manner in which the vessel is being employed, to order that security for the safe return of the vessel be given by the remaining part-owners, in the amount of the plaintiff's interest in the vessel.

In a case which came very recently before the Court (2), two sureties had executed a bail bond for the safe return of a ship, but the duration of the time for which the bond was to continue was left indefinite. After the bond had been in existence for three years, and when the vessel was in this country, and the holders of the majority of the shares were changed, the Court considered that it would be unreasonable to keep the sureties under a liability in perpetuity; and it accordingly ordered the sureties to be released and the bond cancelled on such terms as might be fair.

The Court has a discretionary power to order a vessel which is proceeded against in an action of co-ownership to be sold, but this power will be exercised with great reluctance at the instance of part-owners not possessing a majority of shares (3).

A part owner who dissents from the way in which a ship is employed is entitled to bail in the value of his shares, and he then incurs no liabilities and obtains no profits.

The law as to part-owners was considered in a recent case in which the plaintiff in the action, who was owner of two sixty-fourth shares, and all the other owners of the vessel had concurred in appointing two persons as ship's husbands and managers. The agreement declared that these persons "should be, and at all times thereafter discharge the duties of ship's husbands and managers of the vessel, and of agents for the owners, their executors, and administrators," and also gave

(1) Bruce's Admiralty, 25.

(2) *The Vivienne*, 12 P. D. 185, where the form of order is given.

(3) *The Nellie Schneider*, 3 P. D.

152, where an order was made for the arrest of the ship, and that she should be appraised and sold.

the managers authority to perform all the usual duties of ship's husbands.

The President decided that this agreement did not prevent the plaintiff as a dissentient part-owner from exercising his legal rights, and that it did not confer on the ship's husbands an arbitrary and exclusive management of this vessel as long as she was in existence, and he accordingly decided that the plaintiff was entitled to obtain bail from the other part-owners in the value of his shares <sup>(1)</sup>.

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(<sup>1</sup>) *The England*, 12 P. D. 32, 33.

## CHAPTER VIII.

## MORTGAGES OF SHIP:

Mortgages of ships are governed by the Merchant Shipping Act, 1854. By that Act <sup>(1)</sup> a registered ship, or any share or shares in a registered ship, may be mortgaged.

Mode in  
which  
mortgage is  
effected.

The mortgage is effected by a bill of sale, which must be in accordance with the form provided by the Act, containing an elaborate and detailed description of the vessel. Upon the production of this instrument at the port of registry, the registrar makes a record of it, and, in cases where there are several mortgages of the same ship or share, the mortgagees have priority over one another, notwithstanding any express, implied, or constructive notice, according to the date at which each instrument has been recorded in the register, and not according to the date of the instrument. If the mortgage be in any other form, the registrar cannot be required to record it unless expressly directed by the Commissioners of Customs <sup>(2)</sup>.

The Court of Admiralty had originally no jurisdiction in respect of mortgage, but by the joint effect of the Admiralty Practice and Jurisdiction Act of 1840, and the Admiralty Court Act, 1861 <sup>(3)</sup>, such has been given and extended.

Section 11 of the latter Act provides that the Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship, or the proceeds thereof, are under arrest of the Court or not.

A registered mortgagee can, accordingly, himself institute an action in the ordinary way <sup>(4)</sup>, and can have the ship arrested and detained until bail be given to the amount of his claim.

In a case in which a vessel was owned as to 16 sixty-fourth

<sup>(1)</sup> Sect. 66; see as to what passes by mortgage of a ship: *Coltman v. Chamberlain*, 25 Q. B. D. 328.

<sup>(2)</sup> Merchant Shipping Act, 1854, s. 69; 18 & 19 Vict. c. 91, s. 11; *Chasteauneuf v. Cupeyron*, 7 App. Cas. 127.

<sup>(3)</sup> 3 & 4 Vict. c. 65; 24 & 25 Vict. c. 10.

<sup>(4)</sup> The jurisdiction may be exercised either *in rem* or *in personam*: 24 Vict. c. 10, s. 35; and see Bruce's Admiralty, 2nd ed. p. 31, *et seq.*

shares by the master, and as to 48 sixty-fourth shares by another person, the owner of the 48 shares gave the captain a power of attorney to sell his shares. The captain sold the entire vessel at Sydney, where she was re-registered. The co-owner had meanwhile mortgaged his shares, and the mortgage had been registered. The Court decided that the mortgagee was entitled to the shares of ship and freight paramount to the purchaser in Sydney, but subject to allowing him in account for the proportion as of outfit of the ship and the voyage to London <sup>(1)</sup>.

The mortgagee is not deemed to be the owner of the vessel <sup>(2)</sup>, but he has an absolute power of sale, and can give good receipts for the purchase-money <sup>(3)</sup>. A second mortgagee, however, must, before he can exercise the statutory power of sale, obtain the concurrence of the first mortgagee.

Position of  
mortgagee.

Provision is also made to enable an owner to dispose by way of sale or mortgage of a ship or shares at any place abroad, by obtaining from the registrar at the port of registry what are called certificates of sale or of mortgage, which purport to give power to sell or mortgage <sup>(4)</sup>.

The mere fact of the owner of a vessel having executed an absolute transfer of the ship will not preclude him from showing that the intention was to transfer the ship by way of mortgage only <sup>(5)</sup>. The Court will look behind the register to the real character of a transaction, and treat an absolute transfer as a mortgage if it appears that that was the intention of the parties <sup>(6)</sup>. And where a ship, then at sea, was transferred by an absolute bill of sale, which was duly registered, but the transfer was only intended as collateral security for a loan, and the grantor entered into contracts abroad within the general scope of his authority, the Court decided that there was no evidence, either actual or implied, for the master to act as his agent, and that he was not liable on the contracts <sup>(7)</sup>.

"If," said the judges in the superior Court, "this had been the case of an absolute sale, there might have been some doubt about it. But, as it was a mere mortgage by way of security, there is none."

If a man takes a mortgage of land, can he be held responsible

<sup>(1)</sup> *Cato v. Irving*, 5 De G. & S. s. 76.

<sup>(2)</sup> Merchant Shipping Act, 1854, s. 70. <sup>(5)</sup> *Ward v. Beck*, 13 C. B. (N.S.) 668.

<sup>(3)</sup> Merchant Shipping Act, 1854, s. 71. <sup>(6)</sup> *The Innisfallen*, L. R. 1 A. & E. 72.

<sup>(4)</sup> Merchant Shipping Act, 1854, s. 71. <sup>(7)</sup> *Myers v. Willis*, 25 L. J. C. P. 39, 255.

for the expense of the building of a house ordered to be built on the land by the mortgagor?

Position of  
mortgagor.

As long as the mortgagor remains in possession of the ship he retains all the rights and powers of ownership, and all contracts he may enter into with regard to the ship are valid and effectual, provided his dealings do not materially impair the security of the mortgagee. And the mortgagee will be restrained by injunction from interfering with the due execution of such contracts. Thus, where a mortgagor had entered into a beneficial charterparty, the mortgagees were restrained from dealing with the ship in derogation of the charterparty <sup>(1)</sup>. And where some shares in a ship were mortgaged, the mortgagor remaining in possession, and the ship was chartered by third parties and loaded for the voyage, it was held that the mortgagee could not arrest the ship, nor demand bail, unless he could show that the charterparty was prejudicial to his security, and that the circumstance that the effect of carrying out the charterparty would be to remove the ship out of the jurisdiction of the Court and to make it difficult to enforce the mortgage security was not sufficient <sup>(2)</sup>. The law on this subject was stated in 1865 by Lord Westbury (whose judgment was followed in the case to which we have just referred) in the following terms:—

As long as the dealings of the mortgagor with the ship are consistent with the sufficiency of the mortgagee's security, so long as those dealings do not materially prejudice and detract from or impair the sufficiency of the security comprised in the mortgage, so long as the parliamentary authority given to the mortgagor to act in all respects as owner of the vessel, and if he has authority to act as owner, he has of necessity authority to enter into all those contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and benefit of his property.

If the mortgagee takes possession of the vessel, it would seem that on principle, and probably on authority, he is entitled to use her in a reasonable manner <sup>(3)</sup>, but at the same time he can only lawfully use her as a prudent man would use her if she were his own property. He cannot send her at the expense and risk of the mortgagor to any quarter of the globe, or for any indefinite length of time. So that where a mortgagee of a

<sup>(1)</sup> *Collins v. Lamport*, 34 L. J. (Ch.) 196. *The Fanchon*, L. R. 5 P. D. 173.

<sup>(2)</sup> *The Maxima*, 39 L. T. 112; *The Innisfallen*, L. R. 1 A. & E. 72; <sup>(3)</sup> *De Mattos v. Gibson*, 30 L. J. (Ch.) 145.



steamer took possession of her and used her for the purposes of a speculation which resulted in a loss, and subsequently sold her disadvantageously, it was held that he must bear such loss, and be charged with the value of the vessel at the time he took possession of her <sup>(1)</sup>.

The result of the authorities with regard to the effect of a mortgage of a ship has been well summed up as follows:—

Effect of mortgage.

“What is the position of a mortgagee of a ship? I take it that there is a perfect analogy (and cases have been cited and very important ones, to that effect) between the mortgagee of land and the mortgagee of a ship. We know perfectly well that a mortgagee of land has a right, from the very day of his mortgage, to receive the rents. We also know that if he does not choose to enter into possession or give notice to the tenants, but regards his security as sufficient, and allows the mortgagor to receive the rents, those rents can never be recovered back as rents. The mortgagor has a continuing right to receive the rents until the right is intercepted by some action on the part of the mortgagee, and the payment of the rents by the tenants to the mortgagor, notwithstanding the mortgage is perfectly valid and binding. So I take it to be perfectly clear that the mortgagee of a ship, just like the mortgagee of land, has a continuing right to receive all the earnings of a ship, that is, the freight, either under a charter-party or without a charter-party, whenever he thinks fit to enter into possession; and if the ship has earned money he has a right, before the goods are delivered in respect of which the money is earned, to give notice to the consignee, the person having to pay the freight, or to the charterer, who may be a perfectly distinct person, and ordinarily is distinct from one who has to receive the goods, that he is a mortgagee, and that he requires the freight to be paid to him” <sup>(2)</sup>.

On the other hand, it must be borne in mind that the rights of the mortgagor of a ship continue until determined by the mortgagee. The law on this important point was summed up by the Lord Chancellor (Lord Cairns), in the House of Lords, in the following manner:—

“The mortgagee of a ship does not, ordinarily speaking, obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor of a ship undertake to employ the ship in any particular way, or indeed to employ the ship so

<sup>(1)</sup> *Marriot v. The Anchor Reversary Co.*, 30 L. J. (Ch.) 571.

<sup>(2)</sup> *Per Malins, V.C.*, in *Wilson v. Wilson*, L. R. 14 Eq. 40.

as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world, not in earning freight, but for the purpose of bringing home goods of his own or for his own benefit. Or, again, he may, in making through his master a contract for freight at a foreign port, attach to the carriage of the goods a rate of freight which may either be nominal or may be very far under the ordinary rate of freight of the market. All those acts would be the ordinary incidents of the ownership of the mortgagor, who remains the *dominus* of the ship with regard to everything connected with its employment, until the moment arises when the mortgagee takes possession. If the mortgagee is dissatisfied with the amount of authority which the mortgagor possesses by law, it is for him to put an end to the opportunity of exercising that authority by taking the control of the ship out of the hands of the mortgagor" (1).

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(1) Per judgment of Cairns, L.C., 644; see as to mortgagee's right to indemnity: *The Orchis*, 15 P. D. 38. in *Keith v. Burrows*, 2 App. Cas.

## CHAPTER IX.

## BOTTOMRY AND RESPONDENTIA.

Bottomry <sup>(1)</sup> is a contract entered into by the owner of a ship or his agent for the advance of money, for the necessities of the ship to enable her to proceed upon the voyage, upon the security of the ship and freight, or where this is not sufficient upon ship, freight and cargo, the money to be repayable with interest upon the safe arrival of the ship at her port of destination.

Definition  
of bot-  
tomry.

The instrument by which the ship and freight is hypothecated is a deed-poll, called a bottomry bond, sometimes a bottomry bill, and may be in any words which clearly set out the terms of the contract.

When the cargo is thus hypothecated it is more properly called *respondentia*; but, as a general rule, bottomry is applied to hypothecation of cargo as well as of ship and freight.

Bottomry bonds are usually given by the master of a ship which is disabled at a foreign port, when the shipowner is without credit at that port, to procure an advance for the purpose of purchasing necessities or getting the vessel repaired in order to enable her to continue her voyage.

In *The Alexander* <sup>(2)</sup> Sir W. Scott said: "It is necessary for me to state that bonds of hypothecation are of a very high and privileged nature. They were invented for the purpose of procuring necessary supplies for ships which may happen to be in distress in foreign ports where the master and owners are without credit, and where, unless assistance could be secured by means of such an instrument, the vessels and their cargoes must be left to perish. It is important, therefore, for the interests of commerce that bonds of this kind should be upheld with a strong hand. Accordingly they have at all times been so upheld by this Court when they appear to have been entered into *bonâ fide* and without suspicion of fraud."

<sup>(1)</sup> So called because the bottom or keel of the ship as representing, *pars pro toto*, her entire fabric, &c., and also now frequently the cargo, is hypo-

thecated: Fisher on Mortgages, p. 92 *et seq.* See form of bottomry bond: *The Cecilie*, 4 P. D. 210.

<sup>(2)</sup> 1 Dods. 278.

Essentials  
of bot-  
tomry  
bond.

A bottomry bond is enforced in the Court of Admiralty by proceedings *in rem* against the property charged, and, if necessary, the property will be sold and the proceeds distributed.

The maritime risk is essential to the vitality of a bottomry bond <sup>(1)</sup>. So that, if the repayment of the money advanced is not made to depend upon the arrival of the ship at her port of destination, the bond is invalid, but a bottomry bond may be taken as collateral security for bills of exchange drawn on the owners for money borrowed <sup>(2)</sup>.

The master, however, has no authority to hypothecate the ship as security for money borrowed at a foreign port for necessary repairs and disbursements and at the same time to pledge the personal credit of his owner <sup>(3)</sup>.

Nor can the master hypothecate if he can obtain money sufficient for repairs or necessities upon credit. It is only when both he and his owner are without credit at the port in which the ship is that he can give a valid bottomry bond <sup>(4)</sup>.

It was laid down in a recent case <sup>(5)</sup> that in order to constitute a valid bottomry bond the money must be required for the necessities of the ship, and that the authority of the master to borrow money on bottomry is based on such necessity. Reasonable inquiries by a lender may be evidence of his *bona fides*, but will not make a bond valid in respect of anything over and above what is actually or entirely necessary. "The Court," said Brett, M.R., in that case, "has always looked strictly into a bottomry transaction, and has refused to pronounce for the validity of the bond unless it was entered into in good faith. It is as to this good faith that the question of an inquiry by the lender is material, for if no such inquiry has taken place this is evidence of an absence of good faith on the part of the lender, which might cause the Court to give judgment against the bond." "Suppose certain things necessary and reasonable charges made, but an agent in the port whose duty it was to pay. The Court has declared that a bond given in such circumstances is void" <sup>(6)</sup>.

<sup>(1)</sup> *The Indomitable*, 15 Jur. (N.S.) 632; *Stainbank v. Shepard*, 13 C. B. 418; *Stainbank v. Fenning*, 11 C. B. 81.

<sup>(2)</sup> *Stainbank v. Shepard*, 13 C. B. 418; *The Staffordshire*, L. R. 4 P. C. 194.

<sup>(3)</sup> *Stainbank v. Fenning*, 11 C. B. 81.

<sup>(4)</sup> *The Faithful*, 31 L. J. (Ch. D.) 81; *Heathom v. Darling*, 1 Moore P. C. Cas. 5; *Lyall v. Hicks*, 27 Beav. 616.

<sup>(5)</sup> *The Pontida*, L. R. 9 P. D. 177.

<sup>(6)</sup> See further, as to bottomry and respondentia bonds, Newson's Law of Shipping, chap. xii. pp. 134, 145.

## CHAPTER X.

## PRACTICE.

It will be convenient here to notice some of the principal points in addition to those which have been already incidentally mentioned in which the practice of the Probate, Divorce, and Admiralty Division in respect of Admiralty matters differs from that in other Divisions of the High Court.

Order II. R. S. C. 1883, provides that the writ of summons in every Admiralty action *in rem* must be in one of the forms given in the Appendix, one being for writs issued out of the Central Office, the other for those issued in District Registries with such variations as circumstances may require. Writ.

The indorsement is to state the mode in which the service was effected, whether on the ship, cargo, or freight, according to Order IX. rules 11, 12, 13, and 14, as the case may be.

The practice with regard to parties is that in salvage actions owners, masters, and crew are usually plaintiffs in one action. Parties.

In actions of damages the owners of the vessel are usually the only plaintiffs, and owners of cargo and seamen come into the reference.

It was decided in the case of *The Vivar* <sup>(1)</sup>, that a defendant in an Admiralty action desiring to object to the jurisdiction of the Court, may enter an appearance under protest, in accordance with the practice which was in force in the High Court of Admiralty before the coming into operation of the Judicature Acts, and has not been taken away by the new practice. Appearance under protest.

In Admiralty actions *in rem* the statement of claim is to be delivered within twelve days from the appearance of the defendant <sup>(2)</sup>. Statement of claim.

The rules of the Supreme Court contain, in addition to the provision with regard to default of appearance in actions not otherwise specially provided for, a special provision with regard to Admiralty actions. Order XIII., rule 13, provides that in Default of appearance.

(1) 2 P. D. 29.

(2) R. S. C., 1883, Order xx. r. 3.

See as to interrogatories, *The Isle of Cyprus*, 14 P. D. 134.

Default of  
appear-  
ance.

Admiralty actions *in rem*, upon default of appearance, if, when the action comes before him, the judge is satisfied that the plaintiff's claim is well founded, he may pronounce for the claim with or without a reference to the Admiralty registrar or to the Admiralty registrar assisted by merchants, and may at the same time order the property to be appraised and sold, with or without previous notice, and the proceeds to be paid into Court, or may make such order as he shall think just.

In a case where the plaintiff had not given a notice of trial, or waited for the time to elapse which a defendant who had appeared would have in which to plead, the Court pointed out that it was very undesirable to seize and sell ships in great haste, and that there ought to be plenty of time allowed between the seizure and sale. The Court declined to give a judgment conditional on no proceedings by the defendant being taken within the proper time and required the plaintiff to wait for ten days, and file notice of trial before obtaining judgment <sup>(1)</sup>.

In Admiralty actions *in rem* the warrant of arrest is to be served by the marshal or his substitutes, whether the property to be arrested be situate within the port of London or elsewhere within the jurisdiction of the Court, and the solicitor issuing the warrant shall, within six days from its service, file it in the Admiralty Registry.

Under the former practice the warrant of arrest and the citation (for which the writ is now substituted) were treated as one instrument, and both were served by the marshal. The present practice is to allow the solicitor, or his clerk, or some one other than the marshal to effect the service of the writ of summons <sup>(2)</sup>.

Solicitor  
agreeing to  
accept  
service of  
writ.

The Judicature Rules provide that in Admiralty actions *in rem* no service of writ or warrant shall be required where the solicitor of the defendant agrees to accept service and to put in bail, or to pay money into Court in lieu of bail <sup>(3)</sup>.

<sup>(1)</sup> *The Avenir*, 9 P. D. 84.

<sup>(2)</sup> *The Solis*, 10 P. D. 62, where the present and former practice are contrasted in the argument and judgment.

<sup>(3)</sup> R. S. C. 1883, Order ix. r. 10.

By Order v. r. 16. R. S. C. 1883, the affidavit must comply with the following provisions:—

(a.) The affidavit shall state the name and description of the party at whose instance the warrant is to be issued, the nature of the claim or

counter-claim, the name and nature of the property to be arrested, and that the claim or counter-claim has not been satisfied;

(b.) In an action of wages or of possession the affidavit shall state the national character of the vessel proceeded against; and if against a foreign vessel, that notice of the commencement of the action has been given to the Consul of the State to which

Order XII. rules 18, 19. A solicitor not entering an appearance or putting in bail, or paying money into Court in lieu of bail in an Admiralty action *in rem*, in pursuance of his written undertaking so to do, shall be liable to an attachment <sup>(1)</sup>.

In a recent case where the Court considered that the amount for which bail was required was exorbitant, the principle was laid down that parties should not arrest a ship for an exorbitant sum, and if they do, it is no excuse to say that the defendants did not, as it were, struggle to get free by applying to have the bail reduced, nor that the solicitors were ignorant of the facts of the case at the time of the arrest <sup>(2)</sup>.

A party, desiring to prevent the arrest of any property, may cause a caveat against the issue of a warrant for its arrest thereof to be entered in the Principal Registry. Caveat.

The practice is as follows: A notice is to be filed in the Registry, signed by the party himself or his solicitor, undertaking to enter an appearance in any action that may be commenced against the said property, and to give bail in that action in a sum not exceeding an amount to be stated in the notice, or pay such sum into the Registry. A caveat against the issue of a warrant for the arrest of the property is thereupon entered in a book to be kept in the Registry, called the "Caveat Warrant Book" <sup>(3)</sup>.

The following is the form of

PRÆCIPUE FOR CAVEAT WARRANT FOR THIS PURPOSE.

[*Heading as in Form, ante, p. 1050.*]

I [*state name, address and description*] hereby undertake to enter an appearance in any action that may be commenced in the

the vessel belongs, if there be one resident in London, and a copy of the notice shall be annexed to the affidavit;

- (c.) In an action of bottomry, the bottomry bond, and, if in a foreign language, also a notarial translation thereof, shall be produced for the inspection and perusal of the Registrar, and a copy of the bond, or of the translation thereof, certified to be correct, shall be annexed to the affidavit;

- (d.) In an action of distribution of salvage the affidavit shall state the amount of salvage money awarded or agreed to be accepted, and the name,

address, and description of the party holding the same.

(1) R. S. C. 1883, Order xii., r. 18.

(2) *The George Gordon*, 9 P. D. 46.

(3) Rules of Supreme Court, Order xxix. rr. 11, 12. Rule 18 provides that nothing in the Order shall prevent a solicitor from taking out a warrant for the arrest of any property, notwithstanding the entry of a caveat in the "Caveat Warrant Book;" but the party, at whose instance any property in respect of which a caveat is entered shall be arrested, shall be liable to have the warrant discharged and to be condemned in costs and damages, unless he shall shew, to the satisfaction of the judge, good and sufficient reason for having so done.

High Court of Justice against [*state name and nature of the property*], and within three days after I shall have been served with a notice of the commencement of any such action to give bail therein in a sum not exceeding [*state amount for which the undertaking is given*] pounds, or to pay such sum into the Admiralty Registry. And I consent that all instruments and other documents in such action may be left for me at

Dated the            day of            18 .

[*To be signed by the party or by his solicitor.*]

County  
Courts.

The County Courts Admiralty Jurisdiction Act, 1868, enacts that:—

Any County Court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes):—

1. As to any claim for salvage—any cause in which the value of the property saved does not exceed one thousand pounds, or in which the amount claimed does not exceed three hundred pounds <sup>(1)</sup>.

2. As to any claim for towage, necessaries, or wages—any cause in which the amount claimed does not exceed one hundred and fifty pounds.

3. As to any claim for damage to cargo, or damage by collision—any cause in which the amount claimed does not exceed three hundred pounds.

4. Any cause in respect of any such claim or claims as aforesaid, but in which the value of the property saved or the amount claimed is beyond the amount limited as above-mentioned, when the parties agree by a memorandum signed by them or their attorneys, or agents, that any County Court having Admiralty jurisdiction and specified on the memorandum shall have jurisdiction.

The County Courts Jurisdiction Amendment Act, 1869 <sup>(2)</sup>, provides that any County Court appointed or to be appointed to have Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto to try and determine the following causes:—

(1.) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the

<sup>(1)</sup> 31 & 32 Vict. c. 71.

<sup>(2)</sup> 32 & 33 Vict. c. 51, ss. 2, 3.



carriage of goods on any ship, and also as to any claim<sup>(1)</sup> in tort in respect of goods carried in any ship, provided either the amount claimed does not exceed three hundred pounds or the parties agree to submit to the jurisdiction of the Court<sup>(2)</sup>.

Appeals in Admiralty matters from county courts are to a Divisional Court of the Probate, Divorce, and Admiralty Division.

Appeals  
from  
County  
Courts.  
Interest.

It has been a long-established principle of the Admiralty Courts to allow interest on the amount awarded to plaintiffs from the time when the claims arose. This rule, which was characterised by the President as "a sound, equitable rule," is based on the principle which governs Admiralty action that there should be, as far as possible, a complete *restitutio in integrum*, and for this purpose the award of interest on the damages is necessary<sup>(3)</sup>.

The important question as to the order in which various classes of claimants are entitled to rank against a fund produced by the sale of a ship was recently considered in a case in which a suit for necessities had been instituted against a steamship which was in a graving-dock at the time, and on which the owner of the dock claimed a possessory order for dock charges incurred, repairs done, and necessities supplied. There were also other claims, and particularly claims by sailors for wages, disbursements, and passage-money home.

Claims  
against  
fund.

The Court's decision, so far as material for our present purpose, was that the plaintiffs in the action who had placed the fund in Court, so as to be available by the various classes of claimants, must be entitled to the costs of their action up to and inclusive of the sale of the ship, in priority to the other claimants. The claims of the seamen for wages for subsistence and passage-money, all of which were allowed to rank together up to the

(1) See as to county court jurisdiction *The Rona*, 7 P. D. 247; *The Queen v. The Judge of the City of London Court*, 8 Q. B. D. 609; *Robson v. The Owner of the "Kate"*, 21 Q. B. D. 13. In this case it was held that damage occasioned to an object on the bank of a river by contact with the sailing gear of a vessel afloat in the river is not "damage by collision" within sect. 3, sub-sect. 3 of the County Courts Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), and a county court has not Admiralty jurisdiction in respect of such damage; and see as to Admiralty

practice in county courts, Order xxxix., County Court Rules, 1889.

(2) See as to jurisdiction of County Courts in respect of loading agreement: *The Zeus*, 13 P. D. 188. It has been decided that an application for leave to adduce fresh evidence on the hearing of an Admiralty appeal from a County Court may be made to a single judge of the Probate, Divorce and Admiralty Division: *The Eclipse*, 14 P. D. 71. As to appeals from County Courts, see County Courts Act, 1888, Part V.

(3) *The Gertrude, The Baron Aberdare*, 12 P. D. 206.

beginning of the possessory lien, were allowed to come next. The next place was occupied by the owner of the dock exercising his possessory lien <sup>(1)</sup>.

Costs.

A few words must be added in conclusion on the important subject of costs. The costs of all proceedings in the Admiralty Division, as in the other Divisions of the High Court, are now by the R. S. C. 1883, Order LXV., and the Judicature Act, 1890 (*ante*, p. 803), in the discretion of the Court. It follows from this that the former general rule of practice in the Admiralty Court as to the costs of references, namely, that when more than a fourth is struck off a claim each party paid his own costs, and when more than a third the claimant paid the other party's costs, is now obsolete <sup>(2)</sup>. In the case in which this point was decided, the Master of the Rolls in delivering judgment, said:—

“When a Court has such a discretion, it is intended that it should exercise it in each individual case. The moment, therefore, that a hard and fast rule is laid down as to costs, the judge's discretion is fettered. With all deference to that eminent judge, Dr. Lushington, the moment he laid down as a general rule, that if, on a reference the plaintiff did not obtain a certain proportion of his claim, he was to be deprived of, or to pay costs, he did what was wrong. For he tried to fetter his own discretion, and that of his successors, which he had no legal power to do. As to the rule, if it could be made, I doubt if it would be a good rule, and in many cases it must work injustice. But since the judge of the Admiralty Court must exercise his discretion in any case, it is wrong to say there is any rule by which he can be bound.”

The general rule, however, which prevails in the other Divisions of the High Court of Justice that costs follow the event, is followed in the Admiralty.

In a case decided in 1889, in the Court of Appeal, where it was contended that the defence of inevitable accident having succeeded in an action for collision, the old practice of the Admiralty Court dismissing the case without costs, ought to be followed, the following judgment was delivered:

“Under the Judicature Acts, the Court of Admiralty has become a Division of the High Court of Justice. There should be a uniform practice in all the divisions of the Court on the subject of costs. The existing rule in all other branches of the

<sup>(1)</sup> *The Immacolata Concezione*, 9 P. D. 37, 42.      overruling *The Empress Eugenie*, Lush, 140.

<sup>(2)</sup> *The Friedeberg*, 10 P. D. 112,

High Court is that, in the absence of special circumstances, Costs.  
costs follow the event. In this case, the defence relied on from  
the first was inevitable accident. There are here no special  
circumstances arguing a departure from the above-mentioned  
rule; therefore the defendants having set up the defence of  
inevitable accident, and having succeeded, on appeal, in estab-  
lishing that defence, are entitled to the costs both in this Court  
and below." (1)

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(1) *The Monk Seaton*, 14 P. D. 52. See as to costs, *The Batavier*, 15 P. D. 37.

## BOOK XII.

# ECCLESIASTICAL LAW.

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### CHAPTER I.

#### ECCLESIASTICAL LAW: ITS SOURCES, &c.

**Definition.** Ecclesiastical Law (*jus ecclesiasticum*) is defined by Sir Robert Phillimore as the rules and laws which relate to the ministrations and government, rights and obligations of a church established in a state <sup>(1)</sup>.

The sources of the Ecclesiastical Law of England are—

1. The Common Law or *lex non scripta*.
2. The English Canon Law, so far as it has been adopted.
3. Foreign Canon Law.
4. Statute Law.

**1. Common law.** 1. The common law, when considered with regard to the Church of England, falls under two heads. There is (1) the general common law of England which governs all Courts, and in addition to this there is, (2) the common law peculiar to the Church of England, "running side by side with the statute law and assisting in its construction."

There is, as Justice Whitlock said, a *jus commune ecclesiasticum* as well as a *jus commune laicum*, a common law ecclesiastical as well as the ordinary common law of the realm <sup>(2)</sup>.

**2. English canon law.** 2. A statute of Henry VIII., the "Act of Submission," which gave power to draw up a new body of Ecclesiastical law, provided that the canon law should be reviewed, and that until such review, all canons, then existing and not repugnant to the law of the land or the king's prerogative, should still be used and executed <sup>(3)</sup>. This review was never made, and accordingly all canons made previously to that Act are binding on laity and clergy. Canons made since the Act, and not sanctioned by statute, are of no force as regards the laity.

In 1603, the first year of the reign of King James I., 141 canons were collected out of the preceding canons, and these constitute

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<sup>(1)</sup> Phillimore, *Ecc. Law*, p. 12.

<sup>(2)</sup> *Martin v. Mackonochie*, L. R. 2 A. & E. 195, 196.

<sup>(3)</sup> 25 Hen. 8, c. 19, repealed by

1 & 2 Ph. & M. Ch. 8, but revived by 1st Eliz. cap. 1. See further on this subject: Blunt's *Book of Church Law*, p. 10, *et seq.*

the present standard of the English Church, and are binding on the clergy (<sup>1</sup>).

It was laid down by Lord Hardwick (more than 150 years ago, in a very celebrated judgment, the authority of which has since been repeatedly relied upon), as law then universally admitted, that the canons of 1603 did not bind the laity for want of a parliamentary confirmation. "I say *proprio vigore* by their own force and authority; for there are many provisions contained in these canons which are declaratory of the ancient usage and law of the Church of England, received and allowed here, which, in that respect, and by virtue of such ancient allowance, will bind the laity; but that is an obligation antecedent to, and not arising from, this body of canons" (<sup>2</sup>).

3. It must be remembered that that part only of the foreign canon law, which has been adopted by Parliament or by the Courts of this country, is regarded as a part of the ecclesiastical law of this country. 3. Foreign canon law.

"The peculiar character of the English people and the English church is strongly shewn in their determination not to admit the general body of the canon law into these realms, but only such portions of it as were consistent with the Constitution, the common law, and the peculiar usages of the Anglican church. The rules of the general canon law were principally introduced into this country and considerably modified in their introduction, through the medium of provincial constitutions passed by the authority of the metropolitans of England" (<sup>3</sup>).

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(<sup>1</sup>) Dale's Clergyman's Legal Handbook, p. 4, which see as to the canons which have been altered.

(<sup>2</sup>) *Middleton v. Croft*, 2 Atkyns Rep. 650, 653, cited with approval in *Marshall v. Bishop of Exeter*, 3 E. & I. 17, where it is described as a prodigy of industry and learning, and in the recent case of *The Queen v. Archbishop of York*, 20 Q. B. D. 740-748. "In England the authority of the canon law was at all times much restricted, being considered, in many points, repugnant to the law of England, or incompatible with the jurisdiction of the Courts of Common Law; so much of it as has been received, having obtained by virtual adoption, has been for many centuries accommodated by our own lawyers to the local habits and customs of the country; and the ecclesiastical laws may be now described,

in the language of our statutes, as 'laws which the people have taken at their free liberty, by their own consent to be used amongst them, and not as laws of any foreign prince, potentate, or prelate.'" Report of Ecclesiastical Courts Commissioners, vol. i., Appendix, p. 195.

The difference between the common law and the ecclesiastical law is illustrated in an amusing manner in the following passage: Nevertheless, Lord Coke says, by the common law of the land clergymen may use reasonable recreations, in order to make them fitter for the performance of their duty and office. And albeit spiritual persons (he says) are prohibited, by the canon law to hunt; yet by the common law they may use the recreation of hunting.

(<sup>3</sup>) *Martin v. Mackonochie*, L. R. 2 A. & E. 116, 153.

4. Statute  
law.

4. The fourth source of the Ecclesiastical Law of England is the statute law, consisting of a vast and complicated body of legislation, extending over many centuries.

Ecclesiasti-  
cal law of  
England.

The question what is the Ecclesiastical Law of England was considered by Lord Blackburn, in delivering judgment in the House of Lords, in an important case, and answered as follows:—

“The ecclesiastical law of England is not a foreign law. It is a part of the general law of England—of the common law—in that wider sense which embraces all the ancient and approved customs of England which form law, including not only that law to which the term common law is sometimes in a narrower sense confined, but also that law commonly called Equity, and also that law administered in the Courts Ecclesiastical; that last law consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm and form, as is laid down in *Caudre’s Case*, the ‘King’s ecclesiastical law.’ All these laws may be, and are, altered by statutes. When the question arises, what is the English Ecclesiastical Law, it is not ascertained by calling witnesses to prove it, as if it were a foreign law, but by taking judicial notice of what the law is” (1).

In the same case, Lord Blackburn expressed an opinion that, in determining the question what the English Ecclesiastical Law is upon any subject, the Court ought to proceed upon the following rules, as to the relative values of the various classes of authorities:—

1. *Very little* weight ought to be given to treatises so modern as not to have yet been sanctioned by the judges of the Ecclesiastical Courts.

2. *Some* weight was to be given to foreign jurists who treat of the law ecclesiastical as practised in foreign countries, but “much less weight, for it may well be that they are treating of ecclesiastical constitutions which have never been accepted and received in England.”

3. *Great* weight ought to be attributed to the practice of the Ecclesiastical Courts of which the forms of writs are very strong evidence.

4. Great weight ought also to be attributed to the principles of the ecclesiastical law laid down by those ancient writers on the Ecclesiastical Law of England, whose treatises have been accepted by the judges in the Ecclesiastical Courts as of authority.

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(1) *Mackonochie v. Lord Penzance*, 6 App. Cas. 424, 446.

5. *Most weight* of all (and here Lord Blackburn said that he only repeated what had been said by the celebrated Lord Stowell, in the great case of *Dalrymple v. Dalrymple*), was to be attributed to judicial decisions.

The subject of ecclesiastical law may be conveniently considered under the heads: (1) "of persons ecclesiastical" and their property; and (2) of things ecclesiastical, under which head come ecclesiastical parishes and districts, churches, &c. Let us begin with ecclesiastical persons <sup>(1)</sup>.

Division of subject.

The Church of England may be considered as divided into the two classes of the clergy and the laity. The "clergy" comprise all those who have been admitted into orders, and the three orders are bishops, priests, and deacons.

Clergy.

The laity has been defined by Blackstone as such of the people as are not comprehended under the denomination of clergy <sup>(2)</sup>.

Laity.

England is divided, for ecclesiastical purposes, into the two provinces of the Archbishops of Canterbury and York. These provinces are subdivided into thirty-four dioceses,—each diocese into archdeaconries; each archdeaconry into rural deaneries; each rural deanery into parishes, and parishes, in many cases, are again subdivided into district chapelries, consolidated chapelries and ecclesiastical districts <sup>(3)</sup>.

The cardinal point of the constitution of the Church of England, says Sir Robert Phillimore, is her episcopal government. Her polity is in fact founded on the principle stated by Hooker in his 'Ecclesiastical Polity,' *Ecclesia est in Episcopo*, "the outward being of a church consisteth in the having of a bishop."

Let us first consider the mode of election of bishops. The Statute 25 Henry 8, cap. 10, provides that, at every avoidance of any archbishopric or bishopric, the king may grant to the dean and chapter a licence under the great seal, as of old time hath been accustomed, to proceed to election of an archbishop or bishop. This licence is called *congé d'élire*. The licence is accompanied by a letter missive containing the name of the person whom they *shall* elect and choose.

Election of bishops.

By virtue of which licence, the statute goes on to say: "the dean and chapter shall, with all speed in due form, elect and choose the said person named in the letters missive and *none other*."

(1) See a somewhat similar division worked out in Cripp's Ecclesiastical Law.

(2) Blunt's Book of Church Law, p. 2.

(3) The separation of the Dioceses of Gloucester and Bristol, under 47 & 48 Vict. c. 66, will increase the number of dioceses to 35.

Election of  
bishops.

“And if they delay their election above twelve days next after such licence or letters missive to them delivered, the king shall nominate and present, by letters-patent under the great seal, such person as he shall think convenient, to be invested and consecrated in like manner as if he had been elected by the dean and chapter.” The election must be followed by the formal consent of the person elected, and this by confirmation, which involves eleven distinct stages, beginning with the king’s letters-patent requiring the archbishop to proceed to confirmation, including “a citation against opposers,” published and set up by order and in the name of the archbishop at the church where the confirmation is to be held, and ending with the record by the public notary under the archbishop’s command in an instrument “to remain as authentic to posterity” (1).

The law of the church with regard to the duty and power of the vicar-general in respect of objection against the confirmation of a bishop has been made the subject of very careful consideration in two cases which attracted a very great deal of public attention, one involving the question of the confirmation of Dr. Hampden as Bishop of Hereford, in 1848, and the other that of Dr. Temple as Bishop of Exeter, December 11th, 1869. In both cases the election of the Crown was confirmed.

In Dr. Hampden’s case the vicar-general refused to hear the objector, and an application for a mandamus, which was subsequently made to the Court of Queen’s Bench, to compel him to do so, was unsuccessful, the Court being equally divided on that point.

In Dr. Temple’s case the objection was on the ground of his opinions expressed in one of the articles contained in the ‘*Essays and Reviews*,’ and the principal charge was that Dr. Temple had maintained and affirmed divers erroneous, strange, and heretical doctrines, positions, and opinions contrary to the doctrine and teaching of the United Church of England and Ireland as by law established, and contravening the statutes, constitutions, and canons ecclesiastical of the realm, and against the peace and unity of the church.

The vicar-general, in delivering judgment, said that if parties believe that the choice of the Crown has been erroneous, it was their duty not to wait until the Crown has approved the election, but to apply at an earlier stage to have the matter set right.

“It is,” he went on to say, “the duty of objectors, if they

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(1) Phillimore, *Ecc. Law*, p. 44, *et seq.*, citing *Gibbs* and *God*.



think the choice of the Crown has been erroneous, to go to her Majesty, and beseech her, or humbly request her, not to issue her mandate for the confirmation of the election. Here her Majesty has approved of the election. She has signified to the archbishop her assent to it, and I now, acting on behalf of his Grace, am invited by the objectors to re-open the large question as to the fitness of Dr. Temple to be bishop of the see of Exeter, to examine witnesses, to pronounce him to be an unfit person to be elected to the episcopal office, and to refuse to confirm his election of which the Queen has signified her approval. I am of opinion that I have no such power."

No man can be ordained or consecrated bishop unless he be full thirty years of age <sup>(1)</sup>.

The Bishops' Resignation Act, 1869 <sup>(2)</sup>, provides that, on a "representation" being made to Her Majesty, by the archbishop of the province, that such archbishop or any bishop in England is desirous of resigning his archbishopric or bishopric by reason that he is incapacitated by age, or some mental or permanent physical infirmity from the due performance of his duties, as archbishop or bishop, Her Majesty may, if satisfied of such incapacity, and that such archbishop or bishop has canonically resigned, by Order in Council declare the archbishopric or bishopric to be vacant, and thereupon such vacancy may be filled up in the same manner and with the same incidents in all respects, as if such archbishop or bishop were dead, with the exceptions following, viz. :—

Bishops' Resignation Act, 1869.

(1.) There shall be paid by the year to the retiring archbishop or bishop, out of the revenue of the archbishopric or bishopric, and as a first charge thereon, in the hands of the successor, such one of the two sums hereinafter mentioned as may be the greater, that is to say, one-third part of the income enjoyed by the retiring archbishop or bishop before his retirement, or two thousand pounds.

(2.) Her Majesty may upon special grounds assign to the retiring archbishop or bishop, for his residence during his life, any episcopal residence which has been up to that time occupied by him.

(3.) The usual fees and charges, with the exception of the necessary expenses of election and consecration, are deferred until the death of the retiring archbishop or bishop.

When a bishop dies or is translated, "in the time of vacation," as it is technically called, *i.e.* during the vacancy of the

(1) Philim. Eccles. Law, p. 27.

(2) 32 & 33 Vict. c. 111.

see, the archbishop of the province is guardian of the spiritualities. All episcopal rights of the diocese belong to him, and all ecclesiastical jurisdiction is exercised by him or his commissioners, for the time. Under this Act also a coadjutor may be appointed to a bishop.

When an archiepiscopal see is vacant, the dean and chapter of the diocese are guardians of the spiritualities, and the spiritual jurisdiction is committed to them.

Custody of  
temporalities.

The custody of the temporalities, *i.e.* lands, tenements, tithes, of every archbishopric and bishopric within the realm, belongs to the king by his prerogative as patron and protector of the church.

Duties of  
bishops.

The chief duties of a bishop consist in the ordination of deacons and priests to their offices, in the institution to livings, holding visitations and confirmations in his diocese, and the consecration of churches and churchyards.

The Pluralities and Residence Act to which we shall have occasion to refer more fully hereafter, enacts, that in every case in which jurisdiction is given to the bishop of the diocese, or to any archbishop under the provisions of that Act, and for the purposes thereof, and the enforcing the due execution of the provisions thereof, all other and concurrent jurisdiction in respect thereof, shall, except as herein otherwise provided, wholly cease, and no other jurisdiction in relation to the provisions of this Act shall be used, exercised, or enforced, save and except such jurisdiction of the bishop and archbishop under this Act; any thing in any Act or Acts of Parliament, or law or laws, or usage or custom to the contrary notwithstanding <sup>(1)</sup>.

“Duchesses, countesses, and baronesses, shall be tried as peers of the realm, but so shall not bishops.” The reason of this is, that bishops have their place in Parliament not on account of nobility but on account of their office, and sit in respect of their possession, *viz.* the ancient baronies annexed to their dignities <sup>(2)</sup>.

Suffragan  
bishops.

A portion of ecclesiastical law, which had practically fallen into abeyance, but which has in recent years become of importance, relates to the appointment of suffragan bishops:—

The law on this subject was chiefly contained in a statute of Henry VIII. <sup>(3)</sup>, which provided for the appointment by the Crown of one of two nominees of the archbishop or bishop

<sup>(1)</sup> 1 & 2 Vict. c. 106, s. 109.

<sup>(2)</sup> Phillimore, *Ecc. Law*, p. 75, citing Staunforde. See Anson's *Law and Custom of the Constitution*, vol. i. p. 198, *et seq.*

<sup>(3)</sup> 26 Henry 8, cap. 14, repealed

by Queen Mary, and revived by Elizabeth: Phillimore, *Ecc. Law*, pp. 6, 96 *et seq.*; Cripps' *Law of Church*, pp. 85, 86. The term “suffragan” is derived from the Latin word “suffragari,” to help.

who was desirous of having a suffragan bishop appointed . . . . . Suffragan  
and provided that the towns therein named should be taken bishops.  
and accepted for sees of bishops suffragans. This Act was  
amended by one of 1888 <sup>(1)</sup>, which is to be cited as the  
Suffragan's Nomination Act. This Act empowered Her Majesty  
by Order in Council to direct that other towns should be taken  
and accepted for sees of bishops' suffragans, and by writing  
under her royal sign manual to substitute for the see of any  
bishop suffragan, nominated before the passing of this Act, any  
town included in any such Order in Council.

A suffragan bishop is not entitled to any of the profits of the  
see, nor to any jurisdiction or episcopal authority within the  
see, but only such "profits, jurisdiction, power and authority,"  
as are licensed or limited by the commission appointing him.

Deaneries are said to have been originally instituted on the Deans,  
analogy of the civil government of the country. Just as every  
hundred for the preservation of the peace was divided into ten  
districts called "tithings," each diocese was for ecclesiastical  
purposes divided by the bishops into "tithings," decennaries, or  
deaneries, each consisting of ten parishes or churches presided  
over by a dean called dean of the city or town, or in the  
country a "rural dean" <sup>(2)</sup>.

A dean and chapter, says Blackstone, are the council of the  
bishop, assist him with their advice in affairs of religion, and  
also in the temporal concerns of his see. It has been shewn  
how the *cong   d'  lire* for the election of the bishop is sent to  
the dean and chapter.

The several kinds of deans are—(1) Deans of Provinces or  
Deans of Bishops; (2) Honorary Deans; (3) Deans of Peculiars;  
(4) Deans of Chapters; (5) Rural Deans. With regard to  
rural deans, Mr. Cripps tells us, legally speaking, the office can  
be scarcely said to exist, or to have any duties necessarily con-  
nected with it; for during the long period of its decay custom  
seems to have transferred all the necessary duties of such an  
office to the archdeacon; as in the visitation of churches,  
houses of residence, &c. At the present day, therefore, the  
duties of the rural dean would be only such as he might be  
deputed to perform by the bishop or archdeacon <sup>(3)</sup>.

The Deans and Canons Resignation Act, 1872 (35 & 36 Vict.  
c. 8), provides that on a representation being made to the

(1) 51 & 52 Vict. c. 56.

(2) Phillimore, *Ecc. Law*, 148;  
Blackstone attributes the origin of  
the term "dean" to the fact that he

at first superintended *ten* canons and  
prebendaries.

(3) Cripps' *Law of the Church and  
Clergy*, 6th ed. p. 135.

Deans.

bishop of the diocese by any dean or canon that he is desirous of resigning his deanery or canonry, by reason that he is incapacitated by age or some mental or permanent physical infirmity, from the due performance of his duties, the bishop shall, if satisfied of the incapacity of the dean or canon by whom the representation is made, certify such incapacity, in writing under his hand to Her Majesty, the archbishop, bishop, body corporate, or person in whom the patronage of the deanery or canonry held by such dean or canon is vested, and from and after the date of such certificate, such deanery or canonry shall be vacant.

In order that a person should be qualified to be a dean, he must have been in priest's orders for six years complete <sup>(1)</sup>.

With regard to the residence of deans and canons, it is provided by statute <sup>(2)</sup> that in every cathedral and collegiate church the term of residence to be kept by every dean thereof shall be eight months, and the term of residence to be kept by every canon thereof shall be three months at the least in every year.

Arch-deacons.

The archdeacon is denominated by the canon law the bishop's eye, *oculus episcopi*. His chief duties are to visit the clergy in his archdeaconry as the bishop visits those of the diocese. A statute of William IV. provides that all archdeacons throughout England and Wales are to have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding <sup>(3)</sup>.

A man cannot be an archdeacon under the age of twenty-five.

The Ecclesiastical Commissioners (*post*, p. 1123), have power, with the consent and confirmation of the bishop, to recommend that any archdeaconry may be further endowed, provided that the augmentation shall not be such as to raise the average annual income of any archdeaconry to an amount exceeding £200. But no archdeacon shall be entitled to hold any endowment or augmentation, or other emolument as such archdeacon under these provisions, unless he shall be resident for the space of eight months in every year within the diocese in which his archdeaconry is situate <sup>(4)</sup>.

An archdeacon may, under certain limitations, hold together with his archdeaconry two benefices, one of which is situated within the diocese of which his archdeaconry forms a part, or

<sup>(1)</sup> 3 & 4 Vict. c. 113, s. 27.

<sup>(2)</sup> 3 & 4 Vict. c. 113, s. 3.

<sup>(3)</sup> 6 & 7 Wm. 4, c. 77, s. 19.

<sup>(4)</sup> 1 & 2 Vict. c. 106, s. 34.

one cathedral preferment in any collegiate or cathedral church of the diocese of which his archdeaconry forms a part, and one benefice situate within such diocese. Archdeacons.

The surveyors of dilapidations appointed under the Ecclesiastical Dilapidations Act, 1871, are elected by the archdeacons and rural deans of the diocese, and a subsequent section of the same Act empowers archdeacons and rural deans to make complaint in writing as to the buildings of a benefice <sup>(1)</sup>.

On the institution of an incumbent to any rectory or vicarage, the bishop's mandate under his hand and seal is issued to the archdeacon to cause the incumbent to be inducted to the temporalities of his benefice, and if the archdeacon does not himself induct, the official of his Court issues a like mandate to the incumbents in the Archdeaconry.

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(<sup>1</sup>) 34 & 35 Vict. c. 43, ss. 8, 12.

## CHAPTER II.

## OF THE CLERGY GENERALLY, &amp;c.

Incumbents are rectors, vicars, donees, perpetual curates, ministers.

Parson. Parson, *persona*, properly signifies the rector of a parish church, because, during the time of his incumbency he represents the church, and in the eye of the law sustains the *person* thereof *vicem seu personam ecclesiæ gerit*, as well in suing as in being sued, in any action touching the same.

The distinction between rectors and vicars consists in this, that the rector is entitled to the great tithes, the vicar only to the lesser tithes, the great tithes in such a case being generally in the hands of a lay impropriator.

Donees are clerks who are the holders of donatives (see *post*, p. 1136).

Under the old law a perpetual curate was not a beneficed clerk, and could hold his cure with any other benefice, but by the Pluralities and Residence Act (1 & 2 Vict. c. 106), it was enacted that "benefices" should comprehend (*inter alia*) perpetual curacies. Hence, generally speaking, perpetual curates are liable to the same restrictions and possess the same privileges as rectors or vicars <sup>(1)</sup>.

Disabilities of clergy. The law has imposed a number of disabilities, and at the same time conferred considerable privileges on the clerical body. A clergyman cannot, whilst holding any cathedral preferment or benefice, or curacy, or lectureship, or whilst licensed to or otherwise allowed to perform any ecclesiastical office, farm on his own account more than eighty acres, without the bishop's special written licence; or engage in, or carry on any trade or dealing, for gain or profit <sup>(2)</sup>, unless with six other partners or more, or unless his share in the undertaking come by inheritance or representative title, and then not as director or manager, or in person (s. 29); but he may be a schoolmaster, and so deal in books; or a director, partner, or shareholder in a benefit or insurance society; and may sell minerals, etc., the produce of

(1) *Weldon v. Green*, cited Phil. 304.

(2) 1 & 2 Vict. c. 106, s. 29.

his own land ; but not in person, if the sale be in open market ; <sup>(1)</sup> he may also be a *member* in a banking co-partnership, but not a manager or director, or personally act therein. Disabilities of clergy.

A clergyman so illegally trading may be suspended for a year for the first offence ; for the second offence so long as the judge shall think fit ; and for the third offence he shall be deprived ; but his contracts are, nevertheless, valid, and such trading renders him subject to the bankrupt law.

A license from the bishop to an incumbent to farm more than eighty acres, must specify the number of years, not exceeding seven, for which the permission is given. The penalty for farming more than eighty acres without permission, is 40s. per acre per annum.

A clerk in holy orders is privileged from arrest *eundo morando aut redeundo* from divine service, or in carrying the Sacrament to sick persons, or in attending visitations, and any one by threats or force obstructing him in discharge of his clerical duties, or arresting any clergyman or minister so engaged, upon any civil process, or under the pretence of executing any civil process, is guilty of a misdemeanour. A clergyman is also exempt from sitting on a jury, and cannot be compelled to serve any temporal office. Privileges of clergy.

No person ordained to the office of priest or deacon is capable of being elected to serve in Parliament as a member of the House of Commons.

And if any person, being a member of the House, shall be so ordained, or become a minister of the Church of Scotland, his seat becomes instantly *ipso facto* void. And if, in either of such cases, he presumes to sit or vote as a member of the House of Commons, he is liable to forfeit the sum of £500 to the party suing for every day in which he has so sat or voted. And he is, moreover, thenceforth incapable of taking, holding, or enjoying any benefice, living, or promotion ecclesiastical whatsoever, or any office of honour or profit under the Crown.

A question arose in a case which attracted much attention at the time, whether the term “reverend” was confined to clergy of the Established Church. This was decided in the negative.

It was pointed out, that in ancient days the term had been used by persons who were not clergymen at all, and that it was employed in common parlance with regard to ministers of denominations separate from the church, *e.g.*, Wesleyans and Presbyterians.

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(1) 1 & 2 Vict. 106, s. 27, *et seq.* ; Stephen’s *Law of the Clergy* ; *Lewis v. Bright*, 4 E. & B. 917.

"It is," said the Lord Chancellor, "an epithet, an adjective used as a laudatory or complimentary epithet, a mark of respect and of reverence, as the name imports, but nothing more" (1).

Church and  
Clerical  
Disabilities  
Act, 1870.

Under the law as it existed prior to 1870 no man admitted a deacon or minister could voluntarily relinquish the same, and though he became a dissenter, he was subject to canonical obedience to his bishop for what he might do according to the rites and ceremonies of the Church of England (2). Now, under the Church and Clerical Disabilities Act, 1870, a minister in the Church of England, after resigning "any and every preferment" held by him, may do the following things:—

(1) May execute a deed of relinquishment in the prescribed form.

(2) May cause the deed of relinquishment to be enrolled in the High Court of Chancery (now Chancery Division).

(3) May deliver an office copy of the enrolment to the bishop of the diocese; and

(4) Give notice of his having so done, to the archbishop of the province.

Six months after an office copy of the enrolment of the deed of relinquishment has been delivered to the bishop, the deed is to be recorded in the registry of the diocese, and thereupon the minister becomes incapable of officiating or acting in any manner as a minister of the Church of England; loses all privileges and exemptions, and is freed from all disabilities, &c., attached to the office of minister in the Church of England.

In a case where a clergyman had, with the view of relinquishing his office, executed the deed in the prescribed form, but had not taken any of the proper steps required by the Act, the Court considered that he had "not gone too far," that there was still a *locus penitentiae* left him, and that accordingly the enrolment might be vacated (3).

An Act of 1868 provides that the incumbent of every new parish for ecclesiastical purposes who is authorised to publish banns of marriages in his church, and to solemnise marriages, churchings, and baptisms, and entitled to secure for his own sole use and benefit the entire fees arising from such offices, is to be deemed and styled the vicar of such new parish (4).

(1) *Keet v. Smith*, 1 P. D. 73, where the question arose with regard to a Wesleyan Minister inscribing his daughter's tombstone with the words the Reverend before H. K., Wesleyan Minister, and where the history of

the subject is carefully considered.

(2) Canon, 76; *Barnes v. Shore*, 8 Q. B. D. 640.

(3) *Ex parte a Clergyman*, L. R. 15 Eq. 154.

(4) 31 & 32 Vict. c. 117.



## PLURALITIES.

The old canon law with regard to pluralities, *i.e.*, the holding by the same person of more than one benefice, was extremely strict, as the canon made in the Council of Lateran, A.D. 1215, ordained that whosoever should take any benefice with cure of souls, if he should before have obtained a like benefice, should *ipso jure* be deprived thereof, and if he should continue to retain the same he should be deprived of the other. The severity of this canon was softened by dispensations, but the old law on the subject possesses nothing more than historical interest, as the whole subject of Pluralities is now governed by the Pluralities and Residence Act, 1 & 2 Vict. c. 106, amended by 13 & 14 Vict. c. 98 and 48 & 49 Vict. c. 54. "The Pluralities Acts Amendment Act, 1885;" and as pointed out by Mr. Cripps, there is probably no branch of the law relating to ecclesiastical matters or affecting ecclesiastical persons which has been so completely altered by enactment <sup>(1)</sup>.

The 2nd section of 1 & 2 Vict. c. 106 provides that no spiritual person (with an exception in favour of archdeacons) can hold more than one cathedral preferment and one benefice. This, however, is qualified by a provision that a dispensation to hold two benefices together may be obtained from the archbishop on a representation made by the bishop, and an appeal lies from the archbishop to the Queen in Council.

The effect of the two later Acts is that any clergyman may, with such licence or dispensation as is required for the holding together of two benefices, take and hold together any two benefices, the churches of which are within four miles of one another by the nearest road, and the annual value of one of which does not exceed two hundred pounds, or if on one of the said benefices there be no church, then the distance between the two benefices for the purposes of this Act shall be computed in such manner as shall be directed by the bishop of the diocese; but, except as aforesaid, it shall not be lawful for any clergyman to take and hold together any two benefices <sup>(2)</sup>. If the population of one benefice is more than 3000, another cannot be held with it with a population above 500 according to the last census, whatever the distance or value, and *vice versâ*.

If a beneficed clerk is instituted to another benefice without

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(1) Cripps' Law of the Church and Clergy, 6th ed. 502.

(2) 48 & 49 Vict. c. 54, s. 14.

the necessary dispensation, the first benefice becomes *ipso facto* vacant <sup>(1)</sup>.

#### RESIDENCE.

The strictness of the old canon law with regard to pluralities found its counterpart in the corresponding rules on the subject of residence, but the subject is now governed by statutory provisions (chiefly contained in 1 & 2 Vict. c. 106).

Every incumbent of a benefice, with cure of souls, must "keep residence in his benefice, or one of them if he have more than one, and in the house of residence (if any)." This enactment is enforced by the following stringent penalties:—

If the absence in one year exceed three calendar months altogether, the incumbent forfeits one-third of the annual value of the benefice; if it exceed six months, one-half; if eight months, two-thirds; and if the absence be for the whole year, three-fourths of the annual value; unless he have his bishop's licence, or be resident in another of his benefices <sup>(2)</sup>.

In addition to these penalties, residence may be enforced by monition, followed thirty days after its service in case of non-compliance, by an order to come and reside, which, after the expiration of a further period of thirty days, may be followed by sequestration of the benefice. It may also be enforced by the compulsory appointment of a curate.

A licence of non-residence may be obtained by petition to the bishop on various grounds enumerated in the Act, viz., dangerous illness of wife or child residing with the incumbent, want of fit house of residence, &c., &c. There may also be special licence granted on other grounds with the consent of the archbishop. Certain persons are, however, exempted from the law as to residence <sup>(3)</sup>.

The widow of a deceased incumbent may remain in the house of residence, where her husband was residing at the time of his decease, for two calendar months <sup>(4)</sup>.

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(1) By 32 & 33 Vict. c. 69; 32 & 33 Vict. c. 109, provides that no proceedings are to be taken against any spiritual person for enforcing residence upon his benefice, or by reason of non-residence upon his benefice, except under 1 & 2 Vict. c. 106, and 13 & 14 Vict. c. 98, or of any Act amending the same; and no

penalty or forfeiture shall be incurred in consequence of non-residence, save and except such penalties as are provided by the said Acts, or any Acts amending the same.

(2) 1 & 2 Vict. c. 106, s. 32, *et seq.*

(3) 1 & 2 Vict. c. 106, s. 42.

(4) 1 & 2 Vict. c. 106, s. 36.

## INCUMBENTS' RESIGNATION ACT, 1871.

The "Incumbents' Resignation Acts, 1871 and 1887," enable an incumbent, who has held a benefice for seven years continuously, to make a representation to the bishop, in the prescribed form, alleging that he is incapacitated by permanent mental <sup>(1)</sup> or bodily infirmity, from the due performance of his duties. The bishop has then power to issue a Commission.

The Commissioners are empowered to allow a pension to the retiring clerk out of the revenues of the benefice. It must not exceed one-third part of the net annual value of the benefice, and shall leave at least a sufficient income to secure to the succeeding incumbent a stipend upon the scale of Curates' Stipends (under 1 & 2 Vict. c. 106, s. 5).

Where the revenues of the benefice are derived from tithe rent-charge or glebe lands, the pension is to vary with the fluctuating corn averages which govern the value of the tithe rent-charge.

This pension is a charge upon the income which the succeeding incumbent is to receive, and is recoverable from him as a debt.

The retired clerk is still amenable to the ecclesiastical discipline; and for certain ecclesiastical offences may have the pension forfeited or suspended as if he were still incumbent. If he is admitted to another benefice, or undertakes clerical duties elsewhere than within the benefice from which he retired, the pension is to cease, or the bishop may order some temporary or permanent reduction of it <sup>(2)</sup>.

The nature of a pension payable to a retired clerk under the Incumbents' Resignation Act, 1871, was much considered by the Court of Appeal in a case decided in 1880. There a retired clerk brought an action against the incumbent of a benefice for payments of the arrears of a pension allowed him under the Act, and the question arose whether the incumbent could set off against the arrears a judgment debt previously due from the plaintiff; the Court of Appeal (affirming the decision of Sir George Jessel) deciding this point in the negative.

The Act, said the judges of the Court of Appeal, does not say "shall not be assigned," but it says "shall not be transferable." Now "transfer" is one of the widest terms that can be used. That very word was used by the legislature not only to

<sup>(1)</sup> Where the incumbent is found a lunatic, the committee of his estate is to act for him.

<sup>(2)</sup> See as to resignation not under this Act, *Reichel v. Bishop of Oxford*, 14 App. Cas. 259, affirming 35 Ch. D. 48.

Resignation.

prevent the incumbent from assigning himself, but for preventing any transfer by operation of law *in invitum*, not only to prevent a voluntary dealing by an incumbent with an annuity, but to prevent the annuity vesting in a trustee in bankruptcy, or being seised or attached under a garnishee order by an execution creditor, or otherwise transferred. He is only allowed to withdraw from his incumbency with the consent of the bishop, and subject to such control as to the bishop or the patron may seem right, by reason of his infirmity, of age, or otherwise. One sees why that provision was put in. Provision is made so that an aged clergyman resigning, and in many instances receiving a very small sum, as is the case in nine-tenths of the cases in this country, should have the entire allowance during the continuance of his infirmity, and not be driven to live in the workhouse, which would not be a very creditable result of such a section of the Act of Parliament.

The effect of the section is that while it is a pension, that is to say, while it remains a charge on the benefice, or while it remains suable for as a debt from the incumbent, it is that which the late incumbent cannot by any act of his own transfer to another. So, in my opinion, it cannot be transferred to another by operation of law in consequence of that other person having got a judgment or other process of law, by which, if it were the absolute property of the debtor without any parliamentary fetter, the creditor could make himself master of the fund and say, "I am entitled to receive it" <sup>(1)</sup>.

The Act provides that if a retired clerk shall on retirement have become liable to the payment to his successor of any sum on account of dilapidations under the Ecclesiastical Dilapidations Act, 1871 (*post*, p. 1131), and shall not have paid such sum in manner in that Act mentioned, it shall be lawful for the incumbent of the benefice for the time being to withhold the amounts due from time to time in respect of any pension granted under the principal Act, and to apply the same in discharge of the sum due for dilapidations as aforesaid until the whole debt shall have been discharged. This, however, is subject to a proviso that the amount so withheld in any one year shall not exceed one-half the total amount of the pension for such year without the consent of the bishop of the diocese in which such benefice shall be situate.

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(1) *Gathercole v. Smith*, 17 Ch. D. 1, 9.

## CURATES.

The term "curate" would appear to have originally comprehended all clerks who had cure of souls, but it is now applied to temporary or stipendiary curates who are employed and paid by a rector or vicar.

Where any benefice which has a licensed curate becomes vacant, the successor may give the curate six weeks' notice to quit, but this privilege can only be exercised within six months from the time of his institution. In all other cases the incumbent of any benefice, whether resident or non-resident, must give six months' notice, and must obtain the permission in writing of the bishop of the diocese, before so doing <sup>(1)</sup>.

No curate shall quit any curacy to which he shall be licensed until after three months' notice of his intention given to the incumbent of the benefice and to the bishop, unless with the consent of the bishop in writing, upon pain of paying to the incumbent a sum not exceeding the amount of his stipend for six months, at the discretion of the bishop <sup>(2)</sup>.

A bishop has power, after giving a curate sufficient opportunity of showing reasons to the contrary, to revoke his licence summarily, subject to an appeal to the archbishop <sup>(3)</sup>.

A curious question arose in 1888 with regard to the validity of a notice given by an incumbent to a curate to quit his curacy. The Act 1 & 2 Vict. c. 106, s. 95, prescribes that in all cases in which proceedings under the Act are directed to be by monition and sequestration, the monition shall issue under the hand and seal of the bishop, and such monition and any *other instrument or notice* issued in pursuance of the provisions of this Act, and not otherwise specially provided for, shall be served by shewing the original notice to the party served, and leaving with him a copy, and if he cannot be found, by leaving a copy at his last residence, and affixing another copy to the door of his parish church, and the original notice with an affidavit of service is then directed to be filed in the Consistorial Registry of the diocese <sup>(4)</sup>. It was decided that these provisions did not apply to the notice to quit the curacy which was given under s. 95 of the Act.

Notice to  
quit  
curacy.

<sup>(1)</sup> 1 & 2 Vict. c. 106, s. 95. An appeal from the bishop's refusal within one month lies to the archbishop.

<sup>(2)</sup> 1 & 2 Vict. c. 106, s. 97.

<sup>(3)</sup> 1 & 2 Vict. c. 106, s. 98.

<sup>(4)</sup> *Tanner v. Scrivener*, 13 P. D. 128, 129.

## CHURCHWARDENS.

**Definition.** Churchwardens are defined or described by Mr. Prideaux as officers of the parish in ecclesiastical affairs as the constables are in civil. They are the guardians or keepers of the church, and the legal representatives of the parish body <sup>(1)</sup>. And he goes on to say the main branches of their duty are: First, to present all matters happening in the parish contrary to the ecclesiastical laws; and secondly, to keep in repair the church, to guard the various things belonging to the church, and to provide such things as may be necessary for the decent service of it.

They are also *ex-officio* overseers of the poor in parishes which maintain their own poor.

All householders who are habitual occupiers must serve if elected, unless they fall within the descriptions mentioned in the note hereto <sup>(2)</sup>.

Women are liable to serve. Poverty is no bar, nor bodily infirmity, unless it amounts to physical incapacity to discharge the duties of the office.

There are usually two churchwardens (one being nominated by the incumbent and one being elected by the parishioners, usually, but not necessarily, at the Easter vestry <sup>(3)</sup>). At the election the chairman has no discretion to refuse a poll, if legally demanded.

The election of the churchwardens is followed by admission, which is essential to complete their legal title, and is effected by subscribing a declaration before the archdeacon or other ordinary.

Churchwardens are required by a statute of William IV. to subscribe a declaration that they will act faithfully. They may, however, act previously, and a churchwarden who has once made the required declaration, and continues office next

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<sup>(1)</sup> Churchwardens are defined in Burn's Ecclesiastical Law as "parish officers, appointed to keep the church in repair and good order, to provide for the orderly performance of divine worship and the administration of the sacraments, and for the preservation of the property belonging to the church."

<sup>(2)</sup> Peers, members of parliament, and clergymen, Roman Catholic clergy taking the oath, &c., sheriffs, justices of the peace, if acting, aldermen, dissenting ministers, barristers, attorneys, medical men, persons re-

siding out of the parish though occupying *lands* in it, all officers in the army, navy, or marines, all soldiers in the militia, commissioners and officers of customs and excise, the Postmaster-General and his officers, registrars of births, deaths, and marriages, churchwardens of other places, and Quakers are exempt from serving as churchwardens: Dale's Ecclesiastical Law, 6th ed. 83, 84.

<sup>(3)</sup> An election at any other time is, however, valid. Special customs both as to nomination and election prevail in some districts.

year without renewing the declaration, is entitled by virtue of his office to do legal acts <sup>(1)</sup>.

Admission must be granted if the election has been regular, and may be enforced by *mandamus*.

Let us now consider what property is vested in the churchwardens when thus duly elected and admitted :—

All goods, chattels, and utensils of the church, bought by the churchwardens, or dedicated to the church, are vested in the churchwardens (in trust for the parishioners) who have the care and management of them, and may sue and be sued in respect of them as a corporation. They must all concur in actions, but when a churchwarden is proceeded against personally, his colleagues need not be joined as defendants.

Goods of  
the Church.

It is the duty of the churchwardens to provide at the expense of the parish, from time to time, to keep in good and sufficient order and repair, all such things as may be necessary for the decent and orderly celebration of the various services of the church, and for the due administration of the holy sacraments; lights for the church, a bell, and all things necessary for the due conduct of the services of the church <sup>(2)</sup>.

Churchwardens are entitled to the possession of all parish books (except register books) and deeds <sup>(3)</sup>.

Churchwardens cannot interfere in the conduct of services. Their remedy is to "present" irregularities to the bishop.

During service they must preserve order (for which purpose they can take offenders into custody) and collect alms.

Churchwardens, subject to the ordinary alone, regulate the seating in the church according to their discretion—even to the extent of reasonably moving a person from one place in the church to another <sup>(4)</sup>. Every parishioner has a right to be seated as far as possible, but unless by prescription or faculty, he has no right to any particular seat. Persons who are not parishioners have no right to a pew or sitting. The incumbent has no power in this respect.

Seats in  
the Church.

Churchwardens have no property in the church, churchyard, or monuments; but to the extent of their funds they are bound to repair the fabric of the church (including fixtures), but not, in the absence of custom, the chancel. Among the duties of

<sup>(1)</sup> 5 & 6 Wm. 4, c. 62, s. 9; *Edney v. Smallbones*, 21 L. T. (N.S.) 500.

<sup>(2)</sup> Since the passing of the Church Rate Abolition Act, 1868, see *post*, p. 1143, these are usually defrayed out of the offertory.

<sup>(3)</sup> Dale's Ecclesiastical Law, 6th ed. p. 90, citing *Addison v. Round* (4 A. & E. 799).

<sup>(4)</sup> In churches built under the Church Building Acts, the seating is specially provided for.

Church-  
wardens.

Churchwardens must also be mentioned that of taking care of the benefice during vacancy or sequestration, and making provision for the performance of the service by a curate. This office is usually committed to them by an instrument of sequestration issued by the registrar, and they are liable to account to the incoming incumbent.

They must also keep the churchyard paths and its fencing in due order and decency, and no stranger can be buried there without their permission.

Churchwardens have only the right of access to the church.

The incumbent has the exclusive right to the keys of the church (subject to the right of access for the churchwardens), and belfry, and the church bells cannot be rung against his consent, except for service, or perhaps under very special circumstances <sup>(1)</sup>.

The office of churchwarden lasts one year, unless the holder has been guilty of misbehaviour. It is not, however, necessarily vacated by ceasing to reside. The duties and position of churchwardens have been much considered in several cases in recent years, which we now proceed to notice.

In a case decided in 1879, in the Consistory Court of London, where two churchwardens were appointed for the Middlesex portion of the parish of St. Sepulchre, and three by the Vestry of the portion of the parish within the city of London, and where the two sets appeared as petitioners and opponents respectively to a petition in respect of certain repairs of the parish church; it was decided that the churchwardens elected by each portion of the parish were equally officers of the ordinary in all matters relating to the management of the parish church, and that a faculty (*see post*, p. 1149), must issue to the petitioners and their opponents jointly <sup>(2)</sup>.

In a case decided in 1887, it was held that churchwardens of a church with free seats have authority, in carrying out their duty of maintaining order and decorum, to direct which of those seats certain classes of the congregation may and others may not sit. They have a right to use a reasonable discretion. It was decided in the same case that a person may be convicted by justices, under 23 & 24 Vict. c. 32, s. 2 (*post*, p. 1187), of riotous, violent, or indecent behaviour, in a church, although such behaviour was in assertion of a *bonâ fide* claim of right <sup>(3)</sup>.

<sup>(1)</sup> Prideaux on Churchwardens, 15th ed., pp. 423, 431. The remedy for refusal is presentment.

<sup>(2)</sup> *Vicar of St. Sepulchre v. The*

*Churchwardens of St. Sepulchre*, 5 P. D. 64.

<sup>(3)</sup> *Asher v. Calcraft*, 18 Q. B. D. 607.



The law with regard to the position of churchwardens was much considered in a case which came before the Queen's Bench Division in 1888. In this case the plaintiff was a boy in a reformatory, and he sued the defendant, the churchwarden of the parish in which the reformatory is situated, for an assault, viz., that the defendant, as the plaintiff was entering the gate of the churchyard with a view of attending service in the church, laid his hand on him and pushed him back, thereby preventing him from attending the church, and thus committed what in law amounted to an assault unless it could be justified. There was no doubt, as the judge said, a technical assault committed for the purpose of testing the right of the churchwarden to prevent the boy from attending service, and the assault was justified on the grounds set forth in the defence: (1) that there was not sufficient accommodation in the church, and that notice had been given to the reformatory that places could not be found for the boys, and (2) that the boys being under sentence for a felony, had no right to a seat. There was no question as to excess in the force used, and the matter was simply one of trying a legal right.

In this case Mr. Justice Stephen cited as a curious illustration of the supposed powers of churchwardens, the following passage from Hawkins' Pleas of the Crown, which had been cited with approval by Baron Alderson some years ago. "Churchwardens, and perhaps private persons, may whip boys playing in church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay hands on those who disturb the performance of any part of divine service, and turn them out of church" <sup>(1)</sup>. But the judge in the present case thought it right to add the following significant comment: "I take that case as I find it, but I do not recommend any one to act on the whipping part of the case. All that shews to my mind quite clearly that the temporal Court not only may, but must, take cognizance of anything which involves an assault."

The judge then elaborately reviewed the legislation with regard to the subject of attendance at church, and proceeded as follows:—

"The effect of this is that any person, be he who he may, who is not a dissenter from the Church of England, is liable to ecclesiastical censure if he does not go to church, and ecclesiastical censure, although he is not to be fined, would operate as a fine,

(<sup>1</sup>) *Taylor v. Timson*, 20 Q. B. D. 671, 679.

Church-  
wardens.

for he might be admonished to go to church, and would be liable to pay the costs of the proceeding.

"Therefore, as every member of the Church of England—and the plaintiff amongst others—is bound to go to church under pain of ecclesiastical censure, it is rather a strong thing to say that churchwardens have the right to prevent them from going to church. It seems to me, that by imposing a general duty to go to church, the legislature confers a general right to resort to the church on the persons whom it obliges to go. . . .

"This boy had a right and was to 'do his endeavour,' to use the words of the statute, 'to go to church,' and though it would be a good plea for him to say that he was turned back by the churchwardens, and therefore could not go, it would not justify the churchwardens. That is, I think, the result of the whole case, that the defendant had no right to keep the plaintiff back." (1)

The result of this singular action was that judgment was given for the plaintiff for the sum of one shilling, with costs upon the High Court scale.

It was decided in 1882, that there is no power given by the Public Worship Regulation Act, 1874 (*post*, p. 1151), to substitute succeeding churchwardens for a churchwarden who has instituted a suit for acts committed during the time he was churchwarden (2).

The duties of churchwardens in conducting parish meetings were much considered in an interesting case which came before the Court in 1876. There the advowson of the parish of Clerkenwell had, by a decision of Lord Hardwicke's pronounced just a century before, been vested "upon the foot and words" of the original trust in the parishioners and inhabitants whose nominee the trustees were bound to present (3).

Under these circumstances the Court considered the rights of the parishioners to exercise the right was clear, that accordingly the wishes of the parishioners required to be ascertained by calling public meetings, and that the churchwardens were the persons in whom the duty of calling such public meetings was

(1) *Taylor v. Timson*, 20 Q. B. D. 671, 682.

(2) *Harris v. Perkins*, 7 P. D. 161.

(3) *Shaw v. Thompson*, 3 Ch. D. 233. In this case Vice-Chancellor Bacon compared the fatal and unfortunate gift of the right of presentation to the parishioners, which had introduced strife upon "a subject in which, of all others, there ought to

be no animosity or needless difference of opinion, to Pandora's box, upon the opening of which there issued discords and animosities and evils of all sorts, though nothing in this instance like Hope had remained at the bottom, unless the prospect of an application to the Court of Chancery might be called a hope."

vested by the law. A question arose whether a resolution that the election should be by ballot was illegal, and the judge, though under the circumstances he declined to set aside the election, expressed a strong opinion that the Acts of Parliament regulating municipal and parliamentary elections which had introduced voting by ballot, had freed that mode of election from the objections that had caused all the judges in a case decided in 1825, and Lord Eldon in a subsequent case, to pronounce it illegal. "Is it," asked Vice-Chancellor Bacon, "unreasonable that the parishioners of Clerkenwell—not intending to adopt those statutes as statutes—not insisting that the statutes give them any right—should adopt these 'organic changes,' or, as we may call them, these improvements which have been made in our generation? Finding that there has been invented a more useful and efficacious mode of secret voting than that which their forefathers practised, they say: 'We choose to adopt the ballot.' In my opinion, there was nothing invalid in the resolution that this election should be carried out by ballot."

Church-wardens.

In connection with the subject of churchwardens <sup>(1)</sup>, a brief allusion must be made to "sidesmen," otherwise "synodsmen" or "questmen," who were in ancient times persons summoned by the bishop out of each parish to give information of the disorders of the clergy and parishioners. This office has become practically obsolete (though it is still legally existent) except in the larger parishes where, however, the sidesmen are rather in the nature of assistant churchwardens. Sidesmen are elected annually by the minister and parishioners. Their qualifications, &c., are the same as those of churchwardens, and they make a similar declaration before the ordinary prior to entering upon office.

Sidesmen.

#### PARISH CLERK.

The office of parish clerk is generally for life, but it is provided by statute that on a vacancy in the office a clerk in holy orders may be appointed; he, however, has no freehold, but may be removed like an ordinary stipendiary curate.

A parish clerk may be removed for sufficient cause, but if he be improperly dismissed, the churchwardens may be compelled

(1) See as to repayment by vestry to churchwarden of costs and expenses of maintenance of disused churchyard and burial grounds, for

which he, acting under their authority had made himself liable: *The Queen v. Vestry of St. Mary, Islington*, 25 Q. B. D. 523.

Parish  
clerk.

by mandamus to restore him to his office. With regard to his removal from office for wilful neglect or misbehaviour in his office, or any misconduct, it is provided by statute that the archdeacon on complaint, may summarily hear and determine thereon, and if the charge be true, may declare the office vacant <sup>(1)</sup>.

The office is not assignable <sup>(2)</sup>.

#### SEXTON.

The word "sexton" is derived from sacristan. The law presumes that when the duties of the sexton are confined *inside* the church, the churchwardens have the right of appointment; but that where, on the other hand, the duties are confined to what is *outside* the church, the incumbent has the right of making the appointment. Where the sexton's duties extend to both spheres, viz., inside and outside the church, the right of appointment is vested in the churchwardens and incumbent jointly. It has been decided that a mandamus would be directed to the churchwardens to restore a sexton where a certificate was produced that it was a custom to choose him for life. But in another case where it appeared that the office was held at pleasure, the mandamus was withheld.

It was decided in an old case on a review of the authorities that women are capable of being chosen sextons, and thus they could vote at the elections of sextons <sup>(3)</sup>.

<sup>(1)</sup> 7 & 8 Vict. c. 59, s. 5.

<sup>(2)</sup> *Nichols v. Davis*, L. R. 4 C. P. 80. See, as to appointment of parish clerk and nature of office, *Lawrence v. Edwards* [1891] 1 Ch. 144, W. N. (1891), 61.

<sup>(3)</sup> Phillimore, *Ecc. Law*, 1913, *et*

*seq.*, citing *Olive v. Ingram*, Str. 1114. See, as to the other officials connected with the church, the beadle (bedell or bydell, *i.e.*, bidder or crier) and the organist: Dale's *Clergyman's Legal Handbook*, 6th ed. p. 97, *et seq.*

## CHAPTER III.

## ECCLESIASTICAL BODIES.

Having thus considered to some extent the law with regard to ecclesiastical persons, who are chiefly to be regarded in their individual capacity, we may next proceed to notice certain bodies of persons who are of great importance in matters ecclesiastical.

## ECCLESIASTICAL COMMISSIONERS.

The Ecclesiastical Commissioners for England, are by that name a corporation having perpetual succession and a common seal, with capacity to sue and to be sued in their corporate name. They were appointed in 1836 with power to hold land notwithstanding the Mortmain Acts.

The Ecclesiastical Commissioners are in all forty-eight in number. The principal personages are both the archbishops, all the bishops, certain deans, the principal officers of state, and the principal judges.

The chief duty of the Ecclesiastical Commissioners so constituted is to make out of the common fund under their control, or by conveyance of the land, tithes, or other hereditaments, from which it arises, additional provision for the cure of souls in parishes where such assistance is most required, in such manner as will be most conducive to the efficiency of the Established Church. In addition to this, many duties connected with the suppression of sinecures, the development of the property of the Church, and the re-arrangement and sub-division of ecclesiastical jurisdiction in its several phases—episcopal, archidiaconal, ruridecanal, and parochial—are entrusted to them <sup>(1)</sup>.

Duties of  
Ecclesiasti-  
cal Com-  
missioners.

The procedure or *modus operandi*, by which the Commissioners so constituted exercise their powers, is as follows:—

Certain of the functions committed to them are exercised by instruments under their common seal. With regard to others, the Commissioners are specially empowered to make due inquiry, and are from time to time to prepare and lay <sup>(2)</sup>

(1) See as to the power of the Commissioners to resell site of parsonage purchased by them: *Ecclesiastical Commissioners to King*, 38 W. R. 473.

(2) The Commissioners may, by summons under the hand of the chairman, require the attendance of any person whom they shall think

Ecclesiastical Commissioners.

before the Queen in Council, such schemes as appear to them to be required. In these schemes they are to recommend and propose such further measures as may appear to them necessary for carrying them into effect.

Before laying any such scheme before the Queen in Council, notice thereof is to be given to the corporation, aggregate or sole, and persons entitled to notice, and the objections, if any, are to be laid before the Queen in Council together with the scheme in question.

When any such scheme shall have been approved by the Queen in Council, she may make an order or orders ratifying the same, and specifying the time or times when such scheme, or the several parts thereof, shall take effect, and direct every such order to be registered by the registrar of each of the dioceses, whereof the bishop, or within which any cathedral or collegiate church, dignitary, chapter, member of a chapter, officer, incumbent, or any other person or body corporate, may or shall be in any respect affected thereby.

Every such order, as soon as may be after the making of it, is to be inserted in the *London Gazette*; and, so soon as it is so gazetted, it is in all respects, and as to all things contained in it, to have the same force and effect as an Act of Parliament.

In 1850 <sup>(1)</sup>, the management of the landed estates of the Ecclesiastical Commissioners was entrusted to a semi-independent body styled the "Estates Committee."

The principal duty of this "Estates Committee," is to consider all matters in any way relating or incident to the sale, purchase, exchange, letting, or management, by or on behalf of the Ecclesiastical Commissioners <sup>(2)</sup>, of any lands, tithes, or

fit to examine touching any matter within their cognizance, and may also make any inquiries and call for any answers or returns as to any such matter; and also administer oaths, and examine every such person upon oath, and cause to be produced before them upon oath all statutes, charters, grants, deeds, writings, &c., or copies thereof respectively, in anywise relating to any such matter; or in lieu of requiring such oath the Commissioners may, if they think fit, require any such person to make and subscribe a declaration of the truth of his examination: 6 & 7 Will. 4, c. 77, s. 9.

By the Attorney and Solicitors Act, 1874, the person appointed solicitor to the Ecclesiastical Commissioners, and any clerk or officer appointed to act for him, is to be deemed a duly qualified solicitor.

<sup>(1)</sup> 13 & 14 Vict. c. 94.

<sup>(2)</sup> No act respecting the sale, purchase, exchange, letting, or management of any lands, tithes, or hereditaments, including the affixing of the common seal to any scheme or other instrument within the powers of the Ecclesiastical Commissioners, can be executed by them otherwise than by the Estates Committee: 13 & 14 Vict. c. 94.

hereditaments, and to devise such measures touching the same as shall appear to such committee to be most expedient <sup>(1)</sup>.

Ecclesiastical Commissioners.

In a case where the owners of a rent-charge which was charged on glebe lands, and was in arrear, brought their action for a declaration that they were entitled under an order made by the Inclosure Commissioners to a charge on the lands, and asking for an enforcement of their rights by a sale of the lands, it was decided that the Ecclesiastical Commissioners were not necessary parties <sup>(2)</sup>.

#### QUEEN ANNE'S BOUNTY.

The Governors of Queen Anne's Bounty, whose full title is "the Governors of the Bounty of Queen Anne for the augmentation of the maintenance of the poor clergy," are a body corporate, who owe their origin to a statute of Queen Anne, by which the first-fruits and tenths then paid by the incumbents of ecclesiastical benefices to the Crown were applied to the augmentation of the livings of the poorer clergy.

From the time of the Reformation, the first-fruits and tenths of the clergy formed a part of the revenue of the Crown. By the Act 23 Hen. 8, c. 20, the payment of first-fruits to Rome was thenceforth forbidden, and by 26 Hen. 8, c. 3, the first-fruits (i.e. the first year's income) of all benefices and dignities, and the tenths *annates decimæ* (i.e. the tenth part of each succeeding year's income) were made payable to the king and his successors.

The first-fruits and tenths were relinquished by an Act 2 & 3 Ph. & M. c. 4, but resumed by the Crown by 1 Eliz. c. 4, by which latter Act, however (sect. 29), all vicarages not exceeding £10, and all rectories not exceeding 10 marks annual value (according to the *Liber Regis*) were discharged from the payment of first-fruits. Queen Anne "piously restored them to the Church, not indeed by remitting them entirely, but in a spirit of the truest equity, by applying the first-fruits and tenths arising from the large benefices to make up in some degree the deficiencies of the smaller" <sup>(3)</sup>.

In pursuance of the Act (Queen Anne's) a number of *personages*, the chief of whom are the archbishops, bishops, deans, privy

<sup>(1)</sup> By 13 & 14 Vict. c. 94, three "Church Estates Commissioners" were constituted. Their duties are now to a very great extent merged in those of the Ecclesiastical Commissioners and the Estates Committee.

<sup>(2)</sup> *Scottish Widows Fund v. Craig*, 20 Ch. D. 208; *Northern Assurance Co. v. Harrison*, W. N. (1889), 58, 74.

<sup>(3)</sup> 2 Anne, c. 11; Hodgson's Account of Queen Anne's Bounty, p. 5.

Queen  
Anne's  
Bounty.

councillors, and judges, were incorporated by letters patent. Any five of the governors, of whom three at least shall be archbishops and bishops, shall be a quorum, and sufficient at any court for the despatch by majority of votes of all business <sup>(1)</sup>.

The Interpretation Act, 1889 (52 & 53 Vict. c. 63), provides "that the expression Queen Anne's Bounty, shall mean 'the Governors of the Bounty of the Queen for the augmentation of the maintenance of the poor clergy.'"

Under 17 Geo. 3, c. 53 (known as Gilbert's Act), s. 12, the governors may lend money to incumbents to repair and rebuild their residence houses to the amount of £100, on which no interest is to be paid, where the annual value of the living is under £50; and to the amount of two years' value of the living in other cases, on which interest at 4 per cent. is to be paid <sup>(2)</sup>.

The duties of the board have from time to time been considerably extended. In addition to the collection and distribution of the first-fruits and tenths and the acceptance of private benefactions for poor benefices, they have had numerous other duties cast upon them by the Legislature, such as the important duties under the Ecclesiastical Dilapidations Act, 1871 <sup>(3)</sup>, the receipt and management, as trustees, of endowment funds <sup>(4)</sup>, proceeds of redemption of ecclesiastical tithe rent-charge <sup>(5)</sup>, consideration money for enfranchisement of copyholds held of manors attached to benefices <sup>(6)</sup>, proceeds of sale of parsonages <sup>(7)</sup>, old buildings <sup>(8)</sup>, and glebes in certain cases <sup>(9)</sup>, and numerous other funds.

#### CONVOCATION.

Lastly, in connection with the subject of ecclesiastical persons and bodies, a brief allusion must be made to Convocation, which is defined by Sir Travers Twiss <sup>(10)</sup>, as an assembly of the spirituality of the realm of England, which is summoned by the metropolitan archbishops of Canterbury and York respectively, within their ecclesiastical provinces.

The two Convocations of Canterbury and York are summoned at the same time as Parliament, pursuant to a royal writ issued

<sup>(1)</sup> 28 & 29 Vict. c. 69, s. 5.

<sup>(2)</sup> Amended by 1 & 2 Vict. c. 23, s. 4.

<sup>(3)</sup> 34 & 35 Vict. c. 43.

<sup>(4)</sup> 2 & 3 Vict. c. 49, ss. 12, 13; 3 & 4 Vict. c. 20, s. 5.

<sup>(5)</sup> 9 & 10 Vict. c. 73, s. 8.

<sup>(6)</sup> 22 & 23 Vict. c. 94, s. 17.

<sup>(7)</sup> 1 & 2 Vict. c. 23, s. 17.

<sup>(8)</sup> 2 & 3 Vict. c. 49, s. 17.

<sup>(9)</sup> 2 & 3 Vict. c. 49, ss. 15, 16; 8 & 9 Vict. c. 70, s. 20; 9 & 10 Vict. c. 164, ss. 19, 20.

<sup>(10)</sup> Article on Convocation, *Encyclopædia Britannica* to which the reader is referred. See also Cripps' *Ecclesiastical Law*, 6th ed. p. 21, *et seq.*



by the Sovereign as head of the Church. They are in the nature of a parliament, and all the lower orders of clergy have representatives. The Convocation of York consists of one house, and that of Canterbury of two; the archbishop and bishops forming the upper, and the lower consisting of deans, archdeacons, and the proctors for the chapters and for the parochial clergy <sup>(1)</sup>.

Convoca-  
tion.

The position of Convocation was much considered by the Queen's Bench Division in a recent case in which a rule for a mandamus was obtained, calling upon the Archbishop of York, as president of the convocation of the province of York, to show cause why a mandamus should not issue directing him to admit into convocation a canon as a proctor duly elected to represent the clergy of the archdeaconry of Durham in the Lower House.

The Archbishop argued the case in person, and those who desire to understand the past history and present position of convocation will do well to peruse with care the arguments and judgment. Lord Coleridge in delivering the judgment of the Court to the effect that they had no jurisdiction to grant the mandamus commanding the archbishop to admit the candidate to Convocation, after reviewing at some length the history of the subject, expressed himself as follows:—

“What we are asked to do is to interfere in the internal affairs of an ancient body as old as Parliament and as independent, to control the action of its president, and to revise or reverse his decision on a matter relating to the constitution of the body itself. For 700 or 800 years it is conceded that no precedent for such an interference can be found. Such an interference would not only be without a shadow of precedent, but would be inconsistent with the character and constitution of the body with which we are asked to interfere” <sup>(2)</sup>.

Thus far we have considered the law as to ecclesiastical persons and bodies. The next subject for our consideration is things ecclesiastical, under which head we shall first consider parishes, and then notice briefly some of the principal classes of ecclesiastical property.

(1) Dale's Clergyman's Legal Handbook, 6th ed. p. 1, *et seq.* The right which the clergy formerly possessed of taxing themselves in convocation was finally extinguished about 1665, in consequence of a verbal and wholly informal agreement between Archbishop Sheldon

and Lord Clarendon, who was at that time Lord Chancellor. Per Lord Coleridge, C.J., *The Queen v. The Archbishop of York*, 20 Q. B. D. 740, 746. Convocation has ceased to exercise any legislative powers.

(2) *The Queen v. The Archbishop of York*, 20 Q. B. D. 740.

## CHAPTER IV.

## PARISHES.

Parishes are either (1) ancient or original parishes. An ancient parish is defined by Blackstone as being that circuit of ground which is committed to the charge of one parson or other minister having cure of souls therein ; or (2) statutory parishes, i.e., parishes formed either under a special Act of Parliament, or under General Acts, as the Church Building Acts and the New Parishes Act.

Before 1818, when the first of that complicated series of measures known as the Church Building Acts was passed, there was no legal machinery by which a parish could be divided, but under these Acts provision has been made for the formation of the following ecclesiastical districts, viz. :—

1. Distinct and separate parishes.
2. District parishes.
3. District chapelries.
4. Consolidated chapelries.
5. Particular or patronage districts.
6. Peel districts.
7. Peel parishes.
8. New parishes for ecclesiastical purposes.
9. Separate benefices.
10. United and disunited benefices.

The reader will find hereafter (at p. 1156) a tabular view of the method on which the principal of these districts are formed under the various Church Building Acts, which are there particularly mentioned, and the New Parishes Act. Foremost in importance among this latter class comes Lord Blandford's Act (19 & 20 Vict. c. 104), and the 15th section of that Act, which has been justly described as the pith and essence of the whole, and the point towards which all other provisions converge, provides that—

“ The incumbent of every new parish created, or thereafter to be created pursuant to the provisions of the Acts of 1843 and 1844, or of that Act shall, saving the rights of the bishop of the

diocese, have sole and exclusive cure of souls, and the exclusive right of performing all ecclesiastical offices within the limits of the same, for the resident inhabitants therein, who shall for all ecclesiastical purposes be parishioners thereof and of no other parish, and that the new parish shall have the same rights and privileges, and be subject to the same liabilities and no other as a distinct and separate parish " (1).

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(1) See *Fuller v. Alford*, 10 Q. B. D. 418, and note, *post*, p. 1159.

## CHAPTER V.

## ECCLESIASTICAL PROPERTY.

Ecclesiastical persons, whether rectors, vicars, or perpetual curates, are in the position of tenants for life of the lands which they hold in right of the Church (*jure ecclesiæ*) <sup>(1)</sup>, and may accordingly be restrained from opening new mines or gravel pits, or cutting timber, except for repairs, unless by leave.

An Act has very recently been passed to facilitate the sale of glebe lands, which is to be cited as the "Glebe Lands Act, 1888 <sup>(2)</sup>." The general idea of the Act may be indicated by saying that it to some extent applies the principles of the Settled Land Act (*ante*, p. 146) to glebe lands, treating the incumbent as the tenant for life.

It provides that the incumbent of any benefice may from time to time, after the prescribed notices to the bishop of the diocese and the patron of the benefice, apply in the prescribed manner to the Board of Agriculture to approve the sale of the glebe land of the benefice, or any part of it, except the parsonage house and such land appurtenant thereto as hereinafter mentioned.

If the Board of Agriculture think fit to entertain the application, and is satisfied that the application has been duly made, and that an objection to the sale either has not been made by the bishop or patron, or if made ought not to prevent the sale, and that the sale will be for the permanent benefit of the benefice, it may approve the sale of the land, subject to the provisions of the Act, and the incumbent, with such approval, may sell the land.

The Board of Agriculture, however, is not to have power to approve the sale of any land occupied by the parsonage house,

<sup>(1)</sup> Dale's Clerical Handbook, 6th ed. p. 178, citing *Cruse Dig. tit. 3, ch. i.* In *Sowerby v. Fryer*, L. R. 8 Eq. 417, it was laid down that the expression of Lord Hardwicke in *Knight v. Moseley*, that "parsons have been indulged in selling timber and stone where the money has been applied in repairs," merely means that where the trees

or the quarries are far distant from the spot where they are wanted, the timber or stone may be sold, and similar materials purchased on the spot with the proceeds.

<sup>(2)</sup> 51 & 52 Vict. c. 20 (as altered by 52 & 53 Vict. c. 30). See rules issued under this Act, Law Journal, September, 1890.

or the outbuildings, garden, or other appurtenances of it, or such part of the glebe land as they consider to be necessary for the convenient enjoyment of such house, and its opinion in respect of such matters is to be conclusive.

Glebe  
Lands Act  
1888.

The Board of Agriculture is to invest the residue of the purchase-money after defraying the expenses of the sale and the investment in such one or more of the three following modes as may be selected by the incumbent of the benefice, with the approval of the Board of Agriculture, or (in default of such selection) by the Board of Agriculture:—

- (a.) in purchase of any of the prescribed securities <sup>(1)</sup>;
- (b.) in redemption of land tax, chief rent, or quit rent charged on any part of the glebe which is not sold, so that the same may merge in the glebe; and,
- (c.) in the purchase of any land adjacent to the parsonage house, the possession of which in the judgment of the Board of Agriculture would be for the benefit of the benefice and for the convenient enjoyment of such house.

The law with regard to ecclesiastical buildings may next be noticed, and here one of the most important branches of the law is that which concerns dilapidations.

The law as to dilapidations is now governed by the Ecclesiastical Dilapidations Acts, 1871 and 1872 <sup>(2)</sup>, the first of which came into operation on the 1st of August, 1871.

The new and elaborate machinery thus introduced by the Legislature provides not only for the assessment and application of dilapidation money on the avoidance of benefices, but also for enabling incumbents at any time to execute necessary repairs, and obtain a release from liability for dilapidations extending over a period of five years, and for compelling the execution of repairs upon complaint by the persons interested <sup>(3)</sup>.

The object of these Acts was stated by Lord Coleridge, C.J., in considering a case on the subject as follows:—"In 1871," he said, "the law with regard to ecclesiastical dilapidations was remodelled, and an elaborate machinery was created, whereby the

<sup>(1)</sup> Among these securities the following is mentioned with obvious reference to the provisions of the County Government Act, viz., stock of any county or municipal borough in which trustees are by law authorised to invest either generally or whenever they have power to invest in railway debenture stock, if such

county or municipal borough had, according to the census last published next before the date of the purchase, a population exceeding one hundred thousand.

<sup>(2)</sup> 34 & 35 Vict. c. 43; 35 & 36 Vict. c. 96.

<sup>(3)</sup> Dale's Ecclesiastical Law, 6th ed., p. 187.

Ecclesiastical Dilapidations Acts.

endless disputes and troublesome and expensive litigations between incoming incumbents and outgoing incumbents, or the representatives of deceased incumbents, might be prevented, and a convenient mode provided for defining the liability of incumbents or their estates in respect of dilapidations" (1).

These Acts deal with the following subjects: (1) the mode of ascertaining the amount required for repairs; (2) the means of raising such amount; (3) the application of the money when raised.

Official surveyors are appointed for a general or limited time and for the whole or part of such diocese by the archdeacons and rural deans. These surveyors, their servants, and workmen are empowered to enter and inspect buildings, or benefices, works in progress at seasonable times and within reasonable hours.

Proceedings under the Act may be either voluntary or compulsory.

Inspections are to take place—

1. On the vacancy of a benefice.
2. On complaint by the archdeacon, rural dean, patron, or on the request of the incumbent.
3. When the benefice is under sequestration (2).

The buildings which may be inspected under the Act—

1. The house of residence of archbishops, bishops, deans, and canons.
2. The buildings of any "benefice."

The surveyor's report is sent to the bishop, and a copy of it to the incumbent and sequestrator (if any), who has a month to make any objections. If no objections are made, the report is final; or if objection is made, it is final as modified by the bishop's decision, there being no appeal from his ruling.

The repairs are to be executed by the new incumbent within eighteen months, upon which the surveyor is empowered to issue a certificate of completion of the works, the effect of which is to protect the incumbent from all further liability for five years (3).

Sect. 36 of the Dilapidations Act provides that the sum stated in the order as the cost of the repairs shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable as such at law or in equity, and it has been decided in a case which came before

(1) Per Lord Coleridge, C.J., in

*Kimber v. Paravicini*, 15 Q. B. D. 222, referring to *Jones v. Dangerfield*,

1 Ch. D. 488.

(2) 34 & 35 Vict. c. 43, ss. 12, 13, 29.

(3) Sect. 42, *et seq.*

the Court in 1887 <sup>(1)</sup>, that when an order is made by a bishop stating the cost of the repairs for which the executors of a late incumbent are liable, the sum so stated is a debt payable to the new incumbent out of the assets of the late incumbent *pari passu*, i.e. in equal degree with the debts of his other creditors.

Ecclesiastical Dilapidations Act.

When an incumbent refuses or neglects to duly execute any prescribed repairs in the prescribed manner, and at or within the prescribed time or times, the bishop may raise the sum prescribed in the final report, if not otherwise provided by the incumbent, with all costs, by sequestration of the profits of the benefice.

The Act provides that the new incumbent shall, as and when he shall recover the dilapidation money or any part thereof, forthwith pay the amount recovered to the governors of Queen Anne's Bounty.

Before the Dilapidations Act, the action for dilapidations by the new incumbent against the old was an action of damages; and it might have happened that, though the new incumbent recovered a large amount for dilapidations, not being in any way bound to apply it for the benefit of the living, he might put it in his own pocket. The Act alters the law in this respect: now there must be a survey made, and then the Act provides how the repairs found to be necessary are to be done. The substance of its provisions is this:—The new incumbent is to have an action of debt for the amount which the surveyor has reported. When he has recovered the amount, he is not to be allowed to put it in his pocket, but he must pay it over to the governors of Queen Anne's Bounty <sup>(2)</sup>.

The Act also contains provisions for obtaining loans from the governors of Queen Anne's Bounty, for the variation of works ordered by the surveyor and special certificate thereof, and for pulling down old buildings.

The Dilapidations Act, 1871, also enacts that the incumbent of every benefice shall insure, and during his incumbency keep insured, the house of residence and farm and other buildings for the time being standing on the lands belonging to such benefice, and the outbuildings and offices respectively belonging thereto, and also the chancel of the church, when the incumbent is liable to repair the chancel, against loss or damage by fire, in some office or offices for insurance against loss or damage by

<sup>(1)</sup> *Re Monk. Wayman v. Monk*,  
35 Ch. D. 513.

<sup>(2)</sup> Per Jessel, M.R., in *Wright v. Davis*, 1 C. P. D. 638.

Ecclesiastical Dilapidations Act.

fire, to be selected by such incumbent, to the satisfaction of the governors, in at least three-fifths of the value thereof.

In a case where a benefice had been sequestered and an inspection of the glebe buildings by the diocesan surveyor directed by the bishop, and a report duly made under the Act, the report estimated the cost of the necessary repairs at a certain sum, and no objections were taken to it; the sequestrator being of opinion that a larger expenditure for dilapidations was necessary, without giving notice to any one, without any report and without following any provisions of the Act, made a much larger expenditure on repairs, the Court considered that the intention of the Act was to afford a salutary protection to a class of men often in needy circumstances without any fault of their own and disallowed the expenditure <sup>(1)</sup>.

The freehold of the parish church is in the rector whether lay or spiritual, who may maintain an action for trespass in the High Court <sup>(2)</sup>, but the possession is in the incumbent whether rector, vicar, or perpetual curate, who must allow access to the churchwarden, and parishioners access at proper times <sup>(3)</sup>.

The freehold of churchyards is, in like manner, in the rector or vicar for public purposes.

By the common law of England, every person is entitled to Christian burial in the parish where he dies, whether he be a parishioner or a stranger, and if he dies out of his own parish his relatives may claim to have him buried in the churchyard of his own parish; but it has been decided, that (unless, perhaps, in the case of a prescriptive right or custom to the contrary) the clergyman cannot be compelled to bury in any particular place <sup>(4)</sup>.

The law has been extended by a statute of Geo. 3, so as to include all persons cast on shore from the sea in case of wreck or otherwise, and this has been further extended by a statute passed in the year 1886 (49 & 50 Vict. c. 20), to bodies found in or cast on shore from any tidal or navigable waters <sup>(5)</sup>.

Prior to the Act next referred to, no person could be buried in the churchyard without the full Burial Service being performed. An Act passed in the year 1880 <sup>(6)</sup> provides that

<sup>(1)</sup> *Kimber v. Paravicini*, 15 Q. B. D. 222.

<sup>(2)</sup> *Batten v. Gedge*, 41 Ch. D. 507. See as to right to pew, *Halliday v. Phillips*, 23 Q. B. D. 48.

<sup>(3)</sup> *Griffin v. Deighton*, 33 L. J. Q. B. 181.

<sup>(4)</sup> *Ex parte Blackman*, 1 B. & Ad.

122.

<sup>(5)</sup> The principle thus adopted by the Legislature may remind the classical scholar of the *Ne parce malignus arene particulam dare* of Horace, Od. i., 28.

<sup>(6)</sup> 43 & 44 Vict. c. 41.



any relative, friend, or legal representative, having the charge of, or being responsible for the burial of a deceased person may give forty-eight hours' notice in writing, indorsed on the outside "Notice of Burial," to, or leave or cause the same to be left at the usual place of abode of the rector, vicar, or other incumbent, or in his absence the officiating minister in charge of any parish or ecclesiastical district or place, or any person appointed by him to receive such notice, that it is intended that such deceased person shall be buried within the churchyard or graveyard of such parish or ecclesiastical district or place without the performance, in the manner prescribed by law, of the service for the burial of the dead according to the rites of the Church of England, and after receiving such notice no rector, vicar, incumbent, or officiating minister, shall be liable to any censure or penalty, ecclesiastical or civil, for permitting any such burial as aforesaid. Such notice must be in writing, plainly signed with the name, and stating the address of the person giving it, and must be in the form to the effect given in the schedule to this Act <sup>(1)</sup>.

Burial  
Laws  
Amend-  
ment Act,  
1880.

Sect. 12 of the Act gives liberty to use the burial service of the Church of England in unconsecrated ground, and sect. 13 provides that any minister in holy orders of the Church of England may perform the burial service, in any case where the office for the burial of the dead according to the rites of the Church of England may not be used, and in any other case at the request of the relative, friend, or legal representative, having the charge of or being responsible for the burial of the deceased, may use at the burial service consisting of prayers taken from the Book of Common Prayer and portions of Holy Scripture, as may be prescribed or approved of by the ordinary, without being subject to any ecclesiastical or other censure or penalty.

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<sup>(1)</sup> This is limited by sect. 9 to cases where persons would have right of interment, if the Act had not passed.

## CHAPTER VI.

## ADVOWSONS.

## Definition.

An advowson (*jus patronatus*) is the perpetual right of presentation to a church or ecclesiastical benefice. The term is derived from the Latin word *advocatio*.

Advowsons are of three kinds: (1) Presentative; (2) Collative; and (3) Donative.

A presentative advowson is the right of presenting a clerk to be incumbent of a church, by institution and induction <sup>(1)</sup>.

A collative advowson is where the bishop and patron are the same.

A donative advowson is a right of nomination to a church, chapel, or vicarage, by the patron alone, subject to his visitation only, without presentation, institution, or induction, which, as we have seen, are necessary in the case of a presentative advowson.

It was decided by the House of Lords, in the great case of *Fox v. Bishop of Chester* <sup>(2)</sup>, that the sale of a next presentation when the incumbent is *in extremis* (or at the point of death), with the knowledge of both of the contracting parties, is not void on the ground of simony.

Chief Justice Best, in a celebrated judgment in which he traced the history of the law, expressed himself as follows:—  
“ The affairs of men are best regulated by broad rules, such as exclude all subtle disputes, all doubtful, unsatisfactory inquiries. It would be difficult to establish a rule that should settle what degree of probability of the approaching death of an incumbent should prevent the sale of the avoidance of a benefice, and more difficult to ascertain by evidence when an incumbent was within that degree. I submit to your Lordships that the most convenient rule is that which I conceive the law has already established, namely, that the right to sell the presentation continues as long as the incumbent is in existence.”

In a recent case where the question arose whether the advow-

(1) Advowsons are either appendant or in gross. *Roper v. Harrison*, 2 K. & J. 86.

(2) 1 Dow. & C. 416; 3 Bli. (N.S.) 123; 6 Bing. 1, and see notes thereon Tudor's Real Property Cases.

son of Christ Church, Doncaster, was included in a deed under the general words, "all other hereditaments situate in the parish of Doncaster," the Court of Appeal decided that it did not, and laid down the principle that an advowson, although it is a hereditament, and, as being the right of presentation to a church at a particular place, "does concern land at a certain place," is but a right collateral to land, and is not aptly described as, "being situate at" a particular place, though it may pass under peculiar circumstances, *e.g.* where there is a clear intention, or where it can be shown that no other property in the locality could be contemplated <sup>(1)</sup>.

Simony, so called from its supposed resemblance to the offence of Simon Magus, may be defined as the corrupt presentation of any one to an ecclesiastical benefice for gift, money, or reward. Simony.

By a statute passed in the year 31 Eliz. c. 6, it is provided that if any person shall for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, benefit, or profit whatsoever, directly or indirectly present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for any such corrupt consideration, such presentation, &c., and any admission thereon shall be utterly void. Among the penalties presented by the statute is forfeiture of the presentation to the Crown.

In 1826 the House of Lords decided <sup>(2)</sup> that all bonds for resignation, whether general or special, *i.e.* in favour of specified persons, were simoniacal and void. Three years afterwards an Act was passed <sup>(3)</sup> under which resignation bonds are valid if made in favour of one person or one of two persons specially named, each of them to be either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand-nephew of the patron or of one of the patrons of such spiritual office, not being merely a trustee.

The law on the subject of what is and is not simony, has been summed up as follows:—

It is not simony for a layman, or for a spiritual person not purchasing for himself, to purchase, while the church is full, either an advowson or next presentation, however immediate may be the prospect of a vacancy, unless that vacancy is to be

What is,  
and what  
is not  
simony.

<sup>(1)</sup> *Crompton v. Jarrett*, 30 Ch. Div. 2 Bro. P. C. 211.

298.

<sup>(2)</sup> 9 Geo. 4, c. 94.

<sup>(3)</sup> *The Bishop of London v. Ffytche*,

Simony. occasioned by some agreement or arrangement between the parties.

Nor is it simony for a spiritual person to purchase for himself an advowson although under similar circumstances.

If either a layman or a spiritual person purchase an advowson while the church is vacant, a presentation by the purchaser upon any future avoidance after the church has been filled for that time is *not* simony.

It is simony for *any person* to purchase the next presentation while the church is vacant.

It is simony for a spiritual person to purchase for himself the next presentation, although the church be full.

It is simony for any person to purchase a next presentation—or if the purchase be of an advowson, the next presentation by a purchaser would be simoniacal—if there is any agreement or arrangement between the parties at the time of the purchase for causing a vacancy to be made.

If any person purchase an advowson while the church is vacant, a presentation by the purchaser for that vacancy is simony <sup>(1)</sup>.

It has been decided that the purchase of an “estate for life in an advowson” is not the purchase of a “next presentation” or “next avoidance” within the meaning of the statute of 12th Anne, even though there be only one avoidance during the lifetime of the *cestui que vie*. It was decided in the same case that a clerk who is seised of a freehold estate in an advowson may upon a vacancy offer himself to the bishop and pray to be admitted, and the bishop has no absolute discretion to admit or to reject him <sup>(2)</sup>.

Where an advowson is held in joint tenancy, all the joint tenants must join in making the presentation. The rule is the same with regard to co-parceners (*ante*, p. 60) to whom an advowson has descended, but if they cannot agree to present jointly, “the eldest sister shall have the first turn, the second the next, and so of the rest according to their seniority,” till all the sisters have had their turn, and then the eldest shall begin again, and this is called “a presenting by turns.”

Where an advowson is mortgaged, the mortgagee has the

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(1) Neither a lunatic nor his committee can present to a church. The Lord Chancellor, by virtue of the general authority delegated to him by the Crown, presents to all livings whereof lunatics are patrons, what-

ever the value of them may be; generally, however, giving it to one of the family: Cripps' Clergy Law, 6th ed. 457.

(2) *Walsh v. The Bishop of Lincoln*, L. R. 10 C. P. 518.

right to present, but he cannot present a clerk of his own choice, whether the advowson be appendant or in gross, but must present the nominee of the mortgagor <sup>(1)</sup>.

The special writ of *quare impedit*, which was originally within the exclusive jurisdiction of the Court of Common Pleas, was abolished by the Common Law Procedure Act, 1860, s. 26, and the ordinary form of writ substituted in cases where the right to an advowson was contested.

The Judicature Acts are silent on the subject, but the following form of writ is given in the schedule to the rules; "the plaintiff's claim is *in quare impedit*" <sup>(2)</sup>. The owner of the advowson must bring his action within six months, if not he loses his next right of presentation, even though he should succeed in establishing his claim.

Action as  
to advow-  
son.

There is also a proceeding by what is called *duplex querela* in the Ecclesiastical Court, which is but seldom resorted to, though it has been employed in certain important cases <sup>(3)</sup>.

The patron of a donative benefice, being a qualified clergyman and officiating curate of the church, by deed poll, executed during a vacancy of the benefice, granted the advowson to a trustee in trust to present whomsoever the patron should nominate; the patron then, by word of mouth, nominated himself, and the trustee, by deed poll, granted the office of rector to him.

The Court decided the grant to the trustee was not intended to give him any beneficial interest, but solely to use him as a conduit pipe, that accordingly the transaction was valid, and that the patron thereupon became rector, and entitled to the profits of the benefice <sup>(4)</sup>.

Exchanges relate only to benefices with cure of souls. They are usually effected by each party executing a resignation deed with a condition attached, that the deed should only take effect in case the exchange is carried out. An absolute deed of resignation, though all parties are aware of the nature of the transaction, does not secure the resigning party from the consequences of executing such a deed, the patron being then at liberty to present a clerk of his own choice <sup>(5)</sup>.

Exchanges.

An agreement for exchange is not rendered void by reason of its providing that neither party shall pay dilapidations. The consent of the bishop is required.

<sup>(1)</sup> Phillimore Ecc. Law; Cripps' Clergy Law, 6th ed. pp. 455, 456.

<sup>(2)</sup> See for action in this form: *Welch v. Bishop of Peterborough*, 15 Q. B. D. 432.

<sup>(3)</sup> See *Walsh v. Bishop of London*,

4 A. & E. 242; *Willis v. Bishop of Oxford*, 2 P. D. 192.

<sup>(4)</sup> *Lowe and Another v. The Bishop of Chester*, 10 Q. B. D. 407.

<sup>(5)</sup> *Rumsey v. Nicholl*, 2 C. P. D. 294, affirming 2 C. P. D. 179.

## CHAPTER VII.

## TITHES.

**Definition.** Tithes are defined by Blackstone as a tenth part of the increase yearly arising and accruing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants. The first are usually called predial; the second mixed; the third personal, in which the tithe is only of clear profit.

Great tithes, such as of corn, hay, and wood, generally belong to the rector, the small tithes are the vicar's.

Tithes are incorporeal hereditaments which, in their essence, have nothing substantial or permanent, consisting merely of a right; an estate in tithes being no more than a title to a share or portion of the produce of a certain tract of land after it shall have been separated from the general mass <sup>(1)</sup>.

The old system of tithes, with its many complications, has been long superseded by the series of statutes known as the Tithe Commutation Acts, and accordingly the old law with regard to tithes is of comparatively slight importance <sup>(2)</sup>.

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(1) Bacon's Abridgment. Two terms which require to be explained in connection with the subject of tithes, as well as of ecclesiastical property, are *appropriation* and *impropriation*. Appropriations are the assignment of tithes to clerical corporations, whose members, or some of them, are qualified to do the proper work for which tithes are intended. Impropriations are the assignment of tithes to laymen who are not so qualified.

(2) Cripps' Clergy Law, bk. ii. c. 2. See as to the history of tithes: Blount's Book of Church Law, p. 339, where it is pointed out that the original principle on which they were founded, was the dedication by all lay persons of a tenth of the annual profits or income, and the acceptance of this by the church as the one fund

by which the clergy were to be maintained.

The following are the Acts dealing with the subject of tithes: 6 & 7 Wm. 4, c. 71 (an Act for the commutation of tithes in England and Wales); 1 Vict. c. 69 (Amendment); 1 & 2 Vict. c. 64 (Merger of Tithes); 2 & 3 Vict. c. 62; 3 Vict. c. 15; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 23 & 24 Vict. c. 93; 36 & 37 Vict. c. 42 (Market Gardens); 41 & 42 Vict. c. 42; 49 & 50 Vict. c. 54 (see in the text, *post*, p. 1142). The 4th section of the Tenants' Compensation Act, 1890 (53 & 54 Vict. c. 57), provides that that Act shall not apply to provisions for the payment of tithe rent-charge under the Tithe Commutation Act, and subsequent Acts relating thereto.

Under these Acts a rent-charge, fluctuating according to the price of corn, is substituted in lieu of tithes, and is apportioned among the several lands of the parish. The tithe commutation is effected through the Board of Agriculture <sup>(1)</sup> and the *modus operandi* is either "a voluntary parochial agreement," if the patron and commissioners consent, or by the compulsory award of the commissioners. The rent-charge so established is subject to the same incumbrances, rates, and charges as the tithe for which it is substituted.

The remedy for recovery of tithe rent-charge is as follows:—  
When it is in arrear for twenty-one days after the half-yearly days, the owner of the rent-charge may distrain; and when in arrear for forty days, and no sufficient distress found, a writ may be issued directing the sheriff to summon a jury to assess arrears, followed by an execution, for taking possession of the lands till the debt and costs be satisfied. Only two years' arrears can be recovered at any one time <sup>(2)</sup>.

Recovery of  
tithe rent-  
charge.

In a case which came before the Court in 1885 <sup>(3)</sup>, lands in respect of which a tithe rent-charge was payable had become unproductive, and the remedy by distress and entry had become ineffectual. The Court decided that the rent-charge was not by the statute rendered a charge upon the inheritance, and that its owner was consequently not entitled to claim a sale of the lands in order to recover the arrears of his rent-charge. The law as to tithe rent-charges was well summed up in the judgment as follows—

"The meaning of the Tithe Commutation Act is plain. The nature of tithes before the Act of Parliament was passed is perfectly plain. The right is as old as Leviticus. It is a right to receive what? A portion of the annual produce of cultivated land—that, and nothing else. When the produce has come into existence by the exercise of human industry, then comes a duty to yield up a portion of the produce. Before the Tithes Commutation Act, it went to the person entitled to the tithe, but the legislature has thought fit to alter that, not to alter the nature of tithes. If one keeps in mind first, what are tithes, and next, what is a rent-charge, the legal definition of which is beyond the possibility of question, the difficulties, if any, are easily removed." And, after reviewing the provisions of the Act, and noticing certain decisions to which we

<sup>(1)</sup> 53 & 54 Vict. c. 30.

<sup>(2)</sup> 6 & 7 Wm. 4, c. 71, ss. 69, 81, 82; *Ex parte Arnison*, L. R. 3 Ex. 56; and as Statute of Limitations:

see *Commissioners of Irish Church Temporalities v. Grant*, 10 App. Cas. 74.

<sup>(3)</sup> *Bailey v. Badham*, 30 Cl. D. 84.

have elsewhere referred <sup>(1)</sup>, the judge proceeded, "I come to the conclusion that in the Tithes Commutation Act all that is given to tithe-owners is, that they shall take out of the produce of the land the proportion mentioned in the Act. They have a right to compel the payment of that by distress and entry for two years, and they have no power or right to exercise the power of distress and entry except for two years."

Lands may be discharged from tithes—

1. By non-payment of tithes for the period found by the law, viz. usually thirty years, and in some cases sixty years.
2. By private Acts of Parliament in individual cases.
3. By some established *modus decimandi*.
4. By rent-charge substituted in lieu thereof under the Tithe Commutation Acts (*ante*, p. 1140).
5. By lands given in lieu thereof.
6. By redemption or merger of the tithe <sup>(2)</sup>.

By the 41 & 42 Vict. c. 42, where land charged with rent-charge in lieu of tithe is taken for certain public purposes, including the building of any church, chapel, or other place of public worship, or of any cemetery or other place of public burial, or any school under the Elementary Education Act, the tithe rent-charge must be redeemed at twenty-five years' purchase, on application to the Tithe Commissioners.

An Act (49 & 50 Vict. c. 54), which is to be cited as the Extraordinary Tithe Redemption Act, 1886, provides that after 25th June, 1886 (the date of the passing of the Act), no extraordinary charge shall be charged or levied under the Tithe Commutation Acts on any hop ground, orchard, fruit plantation, or market garden, newly cultivated as such, after the passing of the Act, and also contains provisions for fixing the capital value of the then existing extraordinary charges and their redemption <sup>(3)</sup>.

<sup>(1)</sup> *The Scottish Widows Fund v. Craig*, 20 Ch. D. 208; *Irish Land Commission v. Grant*, 10 App. Cas. 14.

<sup>(2)</sup> Cripps' Clergy Law, 6th ed. p. 287, *et seq.*, where the exceptions are stated.

<sup>(3)</sup> See, as to income tax in respect of tithe rent charge: *Stevens v. Bishop*, 19 Q. B. D. 447; affirmed 20 Q. B. D. 446. As to London tithes: *Payne v. Esdaile*, 13 App. Cas.

613; *Esdaile v. Assessment Committee of the City of London*, 18 Q. B. D. 599; affirmed 19 Q. B. D. 431. See as to rector's tithes: *Reg. v. Christopherson*, 16 Q. B. D. 7; and as to poor-rate payable in respect of rent charge: *Lamplough v. Norton*, 22 Q. B. D. 458. It has been decided that tithes are incorporeal hereditaments, and therefore "land" within the Settled Land Act: *Re Esdaile. Esdaile v. Esdaile*, W. N. (1886) 47.



Another description of church property which may be briefly noticed is that of church rates. Church rates.

Power to enforce payment of church rates was taken away by the Compulsory Church Rate Abolition Act, 1868 <sup>(1)</sup>, which provides that no suit shall be instituted or proceedings taken in any Ecclesiastical or other Court, or before any justice or magistrate, to compel the payment of any church rate.

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(1) 31 & 32 Vict. c. 109; see the subject carefully considered, Dale, 6th ed. chap. x.

## CHAPTER VIII.

## JURISDICTION OF THE COURTS AND PROCEDURE.

## COURTS.

Ecclesiastical Courts.

The Ecclesiastical Courts now existing, are <sup>(1)</sup>—

(1) The Courts of the Primates, or provincial courts, viz.: in the province of Canterbury, the Court of Arches, the judge of which is called the Dean of the Arches, because in old days his Court was held in the Church of Saint Mary-le-Bow, *Sancta Maria de arcubus*. In the province of York, the Supreme Court, called the Chancery Court.

(2) The Diocesan Courts, being the Consistorial Court of each diocese, of which the bishops, chancellor, or commissary, is the judge. The office of chancellor includes in it two offices distinguished in the commission by the separate titles of official principal and vicar-general. The former indicating the jurisdiction in matters spiritual, the latter that in matters temporal.

The provincial courts of the Archbishop of Canterbury and the Archbishop of York are independent of each other; the process of each province does not run in the other, but is sent, by a requisition to the local authority, for execution.

The appeal from each of the provincial courts lies to the Judicial Committee of the Privy Council as representing the Crown.

The Arches Court has appellate jurisdiction from each of the diocesan courts within the province, and may also take original cognizance of causes, by letters of request from each of those courts.

Two very important classes of business have been taken away from the Ecclesiastical Courts, and assigned to civil tribunals. Testamentary causes were in 1857, by the Court of Probate Act (20 & 21 Vict. c. 77), assigned to the Court of Probate and Matrimonial Causes, were by the Divorce and Matrimonial

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(1) The reader who desires information as to the history of the Ecclesiastical Courts is referred to

the Report of the Ecclesiastical Courts Commission, 1883, p. 194, Appendix X.

Causes Act (20 & 21 Vict. c. 85) passed in the same year, assigned to the Divorce Court, both of which courts have now been merged in the Probate, Divorce, and Admiralty Division of the High Court.

By the Legal Practitioner's Act (39 & 40 Vict. c. 66) and the Solicitor's Act (40 & 41 Vict. c. 25), s. 17, the right to practice in the ecclesiastical courts, previously confined to proctors, was extended to all solicitors <sup>(1)</sup>.

The jurisdiction exercised by the Ecclesiastical Courts over the laity in criminal suits was at one time not only recognised by the state, but even expressly guarded by legislation.

The famous Statute of *Circumspectè agatis* passed in the reign of Edward 1, in the year 1285 (the same year as the Statute *de donis, ante*, p. 34) warned his Majesty's judges of that day, in most peremptory language, not to interfere with the jurisdiction of the bishops:—

“See that ye act circumspectly in all matters concerning the Bishop of Norwich and his clergy” (and it must be borne in mind that, as Lord Coke tells us, the name of the “Bishop of Norwich” is put here “only for example; for the statute extends to all the bishops within this realm”). “Not punishing them if they hold plea in court christian of such things as be meer spiritual, that is to wit, of penance enjoined by prelates for deadly sin” <sup>(2)</sup>.

Penance was an ecclesiastical punishment which affects the body of the penitent. “In some cases the penitent was obliged to do a public penance in the cathedral or parish church, or public market, bare legged, and bare headed, in a white sheet, and to

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<sup>(1)</sup> The procedure of the Ecclesiastical Courts has, as is pointed out in the Reports of the Ecclesiastical Commission, p. 1, been reformed in the following respects:—

(1) The Act 17 & 18 Vict. c. 47 altered the practice of the Ecclesiastical Courts as to the taking of evidence, substituting oral for written testimony. It was held in *Bishop of Norwich v. Pearse*, 2 A. & E. 281, that the Act 14 & 15 Vict. c. 99 renders the parties to an ecclesiastical cause, including the defendant in a criminal suit under the Church Discipline Act competent and compellable to give evidence.

(2) By the Act 2 & 3 Wm. 4, c. 93, power was given to enforce orders of the Ecclesiastical Court by

means of sequestration, and it has been decided that this provision applies to all persons in regard to whom orders of the Ecclesiastical Courts may be made.

(3) By the Act 3 & 4 Vict. c. 93, it has been provided that the Judicial Committee or the Judge of any Ecclesiastical Court may, with the consent of the other parties to the suit, order the discharge of a person in custody for contempt. Before this enactment, a person in custody for contempt could be discharged only upon his obedience, and upon payment of the costs incurred by reason of his custody and contempt (see 53 Geo. 3, c. 127 and *Dean v. Green*, L. R. 8 P. D. 79).

<sup>(2)</sup> 13 Edw. 1.

Penances. make an open confession of his crime in a prescribed form of words, which was augmented or moderated according to the quality of the fault, and the discretion of the judge."

Penances, however, are now practically obsolete. In one of the latest cases upon the subject, which was decided in 1856, the chancellor of the diocese followed the example of Lord Stowell, in not enjoining public penance, but contented himself with admonishing the parties and condemning them in costs.

A curious and important case came before the Court in 1876 <sup>(1)</sup>. The question was whether the Arches Court of Canterbury had jurisdiction to entertain a criminal suit against a layman on a charge of falsely swearing before a surrogate, in an affidavit made for obtaining a marriage licence, that the person who was about to marry had had her usual place of abode in a certain parish for the space of fifteen days then last past.

The judge pointed out that although no statute had expressly taken away all the jurisdiction of the Court over matters of false swearing, yet the very statute under the provisions of which the alleged false oath in this case was taken had, by giving jurisdiction to the temporal Courts, inferentially withdrawn it from the courts ecclesiastical. The maxim of law, which was, he said, also a dictum of common sense and justice, that no man shall be punished twice for the same offence, accordingly applied.

"In drawing this conclusion," he went on to say, "I am justified by the high authority of Lord Coke. In Coke upon Littleton, p. 96 b, I find the following passage:—'And here is implied another maxim of the law, that where the common or statute law giveth remedy in *foro seculari* (whether the matter be temporal or spiritual) the conusans of that cause belongeth to the King's temporal Courts only; unless the jurisdiction of the Ecclesiastical Court be saved or allowed by the same statute to proceed according to the ecclesiastical law.'

"It cannot, I think, be doubted that a recurrence to the punishment of the laity for the good of their souls, by ecclesiastical courts, would not be in harmony with modern ideas, or the position which ecclesiastical authority occupies in the country. Nor do I think that the enforcement of such powers where they still exist, if they do exist, is likely to benefit the community.

"For the simple reason stated, I hold that the Court has no jurisdiction in this matter, and I can only express my surprise that with the ordinary courts of the country open to him for the

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(1) *Phillimore v. Machon*, 1 P. D. 488

prosecution and punishment of this offence, any person would have thought it worth while to make this experiment for the revival of a jurisdiction which, if it has not expired, has so long slumbered in peace.”

Procedure  
in Eccle-  
siastical  
Courts.

In a case decided in 1886, the question was whether a clerk in holy orders should be cited before an Ecclesiastical Court to answer a charge that he had been guilty of a grave criminal offence. The Court declined to interfere on the ground that such a charge ought not to be investigated in an Ecclesiastical Court unless the guilt of the alleged offender had been first ascertained by the judgment of a Court of Criminal Jurisdiction <sup>(1)</sup>.

Along with these cases may be read a case decided in 1890 <sup>(2)</sup>, wherein the Ecclesiastical Court exercised jurisdiction. In this case a suit was instituted in the Court of Arches against a clerk in holy orders. The allegation against him in the articles was that he had been convicted before justices in petty sessions of having been drunk and riotous in a public place, and the prayer was that he might be punished for the scandal caused thereby. The respondent denied that he had been drunk and riotous, or that the conviction had caused scandal. He further alleged that the conviction had been obtained by perjured evidence, and he demanded a full inquiry into the facts. The Court decided that the plea was no answer to the articles, and could not be admitted, as the Court had jurisdiction to suspend a clerk in holy orders on account of the scandal caused by the conviction without considering whether the offence charged had been actually committed.

Lord Penzance, in delivering judgment, said: “It was urged in argument that it was hard upon the respondent that he should be precluded from trying the question of drunkenness over again in this Court. If this is really a hardship, it may be borne in mind that in this respect he is only placed in the same position as members of other professions and callings are placed by the conviction in a competent Court of a degrading offence. An officer in the army or navy, if convicted of an indictable offence (say theft) in a Criminal Court could hardly claim with success to have the question of his guilt tried over again in a court martial. Members of the legal profession stand in a like position, and the same measure of justice is dealt out by the unwritten laws which regulate social life. It could hardly be otherwise, for mankind naturally give credence to

<sup>(1)</sup> *In the Matter of A. B.*, 11 P. D. 56. <sup>(2)</sup> *Borough v. Collins*, 15 P. D. 81.

Procedure  
in Eccle-  
siastical  
Courts.

the constituted Courts, and reputation is incurably damaged by their decisions whether erroneous or not." The decision of the Court was that the respondent should be suspended *ab officio* for three months, and that he should pay the costs of the suit.

There are two modes of procedure in all Ecclesiastical Courts. The civil and the criminal.

Practically speaking, says Dr. Phillimore, all civil jurisdiction as to the laity, except such as relates to the fabric and ornaments of the church, the churchyard and churchwardens, has ceased to be exercised by the spiritual Court.

A suit in the Ecclesiastical Court is commenced by a process called a citation, containing the name of the judge, the plaintiff, and name, residence and diocese of the defendant; the cause of action, and the time and place of appearance.

A caveat is a caution entered to stop licences, dispensations, faculties, institutions, and such like, from being granted without the knowledge of the party that enters it.

A peculiarity of ecclesiastical proceedings is that before any plea is admitted the opposite party may object to the admission, either in whole or in part; in the whole, if the facts altogether, even if taken to be true, would not support the demand made or defence set up. In part, if any of the facts pleaded are irrelevant or incapable of proof <sup>(1)</sup>.

In civil suits the plaintiff is entitled to personal answers on oath from the defendant, *i.e.* admissions of fact, but in criminal suits the law proceeding upon the principle that no man is bound to criminate himself, and does not require such answers.

In criminal proceedings the first pleading is called articles; the form is that the judge articles and objects, and all the charges must be broken up into separate positions or articles.

In causes which are not criminal, the first pleading is termed the libel, and runs in the name of the party or his proctor.

In criminal suits the office of the judge is promoted and its promotion is at the discretion of the bishop; when his sanction, however, is once given, all control ceases, and the suit does not abate on his death or removal from the see.

The converse of the writ of prohibition is the writ of mandamus; as a writ of prohibition will issue to prevent the Ecclesiastical Court from over-stepping its bounds, so a writ of mandamus will issue, commanding them to do justice whenever the same is refused or unreasonably delayed.

It is within the discretion of the judge (whether subject or

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(1) Phill. Ecc. Law, 1254.

not to appeal), to inflict a censure or punishment, more or less lenient or severe, according to his judgment of all the circumstances of the case. But the judge has no discretion, while finding the defendant guilty of ecclesiastical offences, to absolve him from all ecclesiastical censure or punishment for those offences.

#### FACULTIES.

A brief allusion must also be made to the jurisdiction of the Courts in respect of faculties.

No alteration, says Dr. Phillimore, either by way of addition or diminution in the fabric, or utensils, or ornaments of the church, ought according to strict law, to be made without the legal sanction of the ordinary. That legal sanction is expressed by the issue of an instrument called a faculty, and in no other way <sup>(1)</sup>.

It must, however, be borne in mind, that the Court is, in Lord Stowell's words, "not hungry after jurisdiction in really small matters of no general moment or significance."

The principle on which the Court proceeds in granting faculties for alterations in parish churches, were thus stated in an eloquent judgment on the subject:—

Principle  
on which  
Court pro-  
ceeds.

All presumption is to be made in favour of things as they stand.

Those who propose to alter the existing state of things have the burden cast upon them to shew that they will make things better than they are—that the church will be "more convenient, more fit for the accommodation of the parishioners who worship there, more suitable, more appropriate, or more adequate to its purposes than it was before;" and if they cannot shew, at least they are bound to shew to the Court, that a majority of those for whose worship the church exists desires the proposed alterations <sup>(2)</sup>.

In a case decided in 1885, a faculty for the erection of chancel gates was granted, but it was pointed out that the decision was founded on the special circumstances of the case, the great richness, &c., and excellence of the ornaments of the chancel, and of the pavement of the chancel, which rendered protection necessary, or at any rate expedient, and other peculiar circumstances, and that it was not to be regarded as a general precedent <sup>(3)</sup>.

<sup>(1)</sup> See as to faculty for burial,  
*Re Sargent*, 15 P. D. 168.

<sup>(2)</sup> *Peek v. Trower*, 7 P. D. 21, 27.

<sup>(3)</sup> *In re St. Agnes, Toxteth Park*,  
11 P. D. 1.

It remains now in connection with this branch of our subject to consider the principal provisions of the two Acts of the present reign regulating proceedings against the clergy. These are The Church Discipline Act (3 & 4 Vict. c. 86) and the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85).

Church  
Discipline  
Act, 1840.

Under the Church Discipline Act, 1840, which prohibits (sect. 23) the institution of any criminal proceedings against a clerk in holy orders of the established church for any offence against the laws ecclesiastical, otherwise than as therein provided, when a clerk is charged with any offence against the laws ecclesiastical, or when scandal or evil report exists about him as having offended against such laws, the first step taken, after fourteen days' previous notice to the accused, is the issue by the bishop of the diocese where the offence is alleged to have been committed, either on the application of a complainant or of his own mere motion, of a commission to inquire into the grounds of the charges or report. The commissioners, five in number, are chosen by the bishop, who, however, must appoint as one either his vicar-general, or an archdeacon or rural dean within his diocese.

The commissioners, or any three of them, take evidence on both sides, on oath in public as to there being a *prima facie* ground for instituting further proceedings, or sufficient to warrant further investigation. The accused is competent and compellable to give evidence <sup>(1)</sup>.

It has been decided <sup>(2)</sup> that the commission issued by the bishop is merely a preparatory step to ascertain whether there is a *prima facie* case for further inquiry before a regular tribunal. It is not necessary, therefore, to do more than to state generally the charge which the party will be required to answer. The charge must be fully specified in the articles.

The report of the commissioners, or of the majority, is filed, a copy being sent to the bishop of any other diocese in which the accused holds preferment. With the consent in writing of both the accused and complainant, the bishop of the diocese in which the clerk holds any preferment may then deliver sentence, not exceeding such sentence as might be pronounced in due course, and the sentence may be enforced as if pronounced after a hearing. Otherwise the proceedings go on, articles are drawn up, signed by an advocate in Doctors' Commons, filed, and served on the accused. The bishop may then require the accused

<sup>(1)</sup> *Bishop of Norwich v. Pearse*,  
L. R. 2 A. & E. 281.

350; and see *Ex parte Edwards*,  
L. R. 9 Ch. 138.

<sup>(2)</sup> *Sheppard v. Bennett*, 4 P. C.



to appear before him, not less than fourteen days after such service, in person or by agent, and upon an unqualified admission of the truth of the articles, pronounce sentence. In any other case the bishop hears the cause with three assessors, one being an advocate or barrister and another his dean, archdeacon, or chancellor.

Church  
Discipline  
Act, 1840.

The bishop of the diocese in which the accused holds any preferment, or if he hold none, in which the offence is alleged to have been committed, may send the case to the Court of Appeal of the province, which is bound to try it on receiving the "Letters of Request" <sup>(1)</sup>, either before or after the report of *prima facie* grounds, but before the articles are filed (s. 13), and may also, whilst proceedings are pending, inhibit him from performing any church service, if such performance appears likely to cause scandal (s. 14). An appeal lies from the decision of a bishop to the provincial Court of Appeal and to the Queen in Council, when a case has been sent to be tried in that Court in the first instance from the bishop, by "Letters of Request" (s. 15). Where the bishop is patron of any preferment of the accused the archbishop is to act in his stead (s. 24).

#### PUBLIC WORSHIP REGULATION ACT (37 & 38 VICT. c. 85).

This Act, which received the Royal Assent on the 7th of August, 1874, makes special provision for deciding questions relating to the ceremonial of public worship. It enacts (s. 4) that proceedings taken thereunder shall not be deemed such proceedings as are mentioned in s. 23 of the Church Discipline Act (*ante*, p. 1150).

The Act provides for the hearing by a judge appointed in the manner described below, of "representations" of alleged infringements of the ceremonial law of the church. After reciting that it is expedient in certain cases to make further regulations for the administration of the laws relating to the performance of divine service; the Act (s. 8) empowers (1) the archdeacon of the archdeaconry, or (2) a churchwarden or any three parishioners of the parish within which any church or burial ground is situated, or for the use of which any burial ground is legally provided, or in the case of cathedral or collegiate churches, any three inhabitants of the diocese, being persons of full age, who have signed and transmitted to the bishop a declaration of membership of the Church of England,

(1) *Sheppard v. Bennett*, L. R. 2 A. & E. 335.

Public  
Worship  
Regulation  
Act.

“to represent” to the bishop that (*a*) within the preceding five years, alterations or additions to the fabric, ornaments, or furniture have been made in such church without lawful authority, or that decorations forbidden by law have been introduced, or that within the preceding twelve months the incumbent (*b*) has used or permitted to be used in such church or burial ground unlawful ornaments of the minister, or neglected to use any prescribed ornament, or (*c*) has failed to observe or cause to be observed the directions of the Book of Common Prayer, relating to the performance of the services, rites, and ceremonies therein ordered, or unlawfully added to, altered or omitted any of such services, rites, and ceremonies.

Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation (in which case he shall state in writing the reason for his opinion, and such statement shall be deposited in the registry of the diocese, and a copy thereof shall forthwith be transmitted to the person or some one of the persons who shall have made the representation, and to the person complained of), he must within the twenty-one days after receiving the representation transmit a copy thereof to the person complained of. He must also require such person, and also the persons making the representation, to state in writing within twenty-one days whether they are willing to submit to the directions of the bishop touching the matter of the said representation, without appeal. If they shall state their willingness to submit to the directions of the bishop without appeal, the bishop shall forthwith proceed to hear the matter of the representation in such manner as he shall think fit, and shall pronounce such judgment and issue such monition (if any) as he may think proper, and no appeal shall lie from such judgment or monition.

No judgment, however, pronounced by the bishop is to be considered as finally deciding any question of law.

If the person making the representation <sup>(1)</sup> and the person complained of shall not, within the specified time, state their willingness to submit to the directions of the bishop, the bishop shall forthwith transmit the representation in the prescribed mode to the archbishop of the province, and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster.

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(1) 37 & 38 Vict. c. 85, s. 9; *R. v. Bishop of London*, 24 Q. B. D. 213.

The judge must give not less than twenty-eight days' notice to the parties of the time and place at which he will proceed to hear the matter of the representation, and before proceeding to give such notice he shall require from the person making the representation such security for costs as he may think proper.

Public  
Worship  
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Act.

The evidence before the judge is to be given *viva voce*, upon oath, in open Court, and the judge has the powers of a Court of record to enforce the attendance of witnesses, &c.; and obedience to the judge or bishop can be enforced by inhibition for not more than three months, but so that if the inhibited clerk does not promise obedience within the three months, by writing under his hand and seal, the inhibition continues, and at the end of three years, or if within that time a second inhibition should be issued, any benefice held by him becomes void <sup>(1)</sup>.

Upon every judgment of the judge or monition issued there lies an appeal to Her Majesty in Council <sup>(2)</sup>.

Modern legislation has also, to some extent, conferred judicial powers and imposed judicial functions upon the archbishops and bishops of the Church. It has already been pointed out that when a bishop has statutory jurisdiction to pronounce judgment under the Pluralities and Residence Act, all other and concurrent jurisdiction in respect thereof wholly ceases <sup>(3)</sup>. A subsequent clause of the same Act confers upon archbishops and bishops a power of taking evidence similar to that which is possessed by judges of the High Court by enacting that when authority is given by the Act to any archbishop or bishop to require any statement or facts to be verified by evidence, or to inquire, or to cause inquiry to be made into any facts, such archbishop or bishop may require any such statement or any of such facts to be verified in such manner as the said archbishop or bishop shall see fit. It is also provided that when any oath, affidavit, or affirmation, or solemn declaration is or may be by or in pursuance of the provisions of the Act required to be made, "such oath, affidavit or affirmation, or solemn declaration shall and may be made either before such archbishop or bishop, or the commissioner or commissioners, or one of them, of such

Judicial  
powers of  
bishops and  
arch-  
bishops.

<sup>(1)</sup> 37 & 38 Vict. c. 85, s. 13.

<sup>(2)</sup> See, as to the Public Worship Regulation Act: *Clifton v. Ridsdale*, 1 P. D. 316 (in the Court of Arches) affirmed on appeal (Privy Council); *Ridsdale v. Clifton*, 2 P. D. 276; *Howard et al v. Bodington*, 2 P. D. 203 (no necessity of complying with Act as to time); *Hudson v. Tooth*,

2 P. D. 125 (as to imprisonment and release); *Dale's Case*, *Enraght's Case*, 6 Q. B. D. 376; 7 App. Cas. 240; *Green v. Lord Penzance*, 7 Q. B. D. 273; 6 App. Cas. 657; *Dean v. Green*, 8 P. D. 79; *Read v. Bishop of Lincoln*, 14 P. D. 88 [1891], vol. i. p. 9.

<sup>(3)</sup> 1 & 2 Vict. c. 106, s. 109, *ante*, p. 1104.

Public  
Worship  
Regulation  
Act.

archbishop or bishop respectively, or before some ecclesiastical judge or his surrogate, or before a justice of the peace, or before a master in Chancery (abolished in 1852), who are hereby authorized and empowered in all and every of the cases aforesaid to administer such oath, affidavit, and affirmation, or to take such declaration, as the case may be" <sup>(1)</sup>.

Jurisdic-  
tion of  
archbishop.

An interesting and important question was raised in 1889 with regard to the question whether the Archbishop of Canterbury had jurisdiction to entertain certain charges of alleged ecclesiastical offences in the conduct of Divine service which were made against the Bishop of Lincoln <sup>(2)</sup>. The bishop appeared under protest, denied the jurisdiction, and affirmed that the proper tribunal to try the charge against him was Convocation. The archbishop, who sat with the vicar-general of the province and four of the bishops appointed as assessors, decided that he had jurisdiction, and concluded an extremely elaborate judgment, in which the authorities are examined in detail and at great length, in the following words which sum up the principal grounds of his decision. "The Court finds that from the most ancient times of the church the archiepiscopal jurisdiction in the case of suffragans has existed; that in the Church of England it has been from time to time continuously exercised in various forms; that nothing has occurred in the church to modify that jurisdiction; and that even if such jurisdiction could be used in convocation for the trial of a bishop, consistently with the ancient principle that in a synod bishops only could hear such a cause, it nevertheless remains clear that the metropolitan has regularly exercised that jurisdiction both alone and with assessors. The cases came all under one jurisdiction, but in many forms: in synods, episcopal, clerical or mixed; in council; in the Upper House of Convocation, with both Houses, in the Court of Arches, in the Court of Audience (some hold) through the vicar-general, through arbitrators, with one assessor, with three or four or five assessors, alone *absque consensu cujuslibet Episcopi*, but always, except for some impediment, personally—*ob reverentiam officii* and *ob reverentiam fratris*. Nor is it strange that while the jurisdiction is one, forms should be many and cases few. The question now before us is touching the action of the archbishop, sitting together with comprovincial assessors. There is no form of the exercise

<sup>(1)</sup> 1 & 2 Vict. c. 106, s. 123.

<sup>(2)</sup> *Read v. Bishop of Lincoln*, 14 P. D. 88. A question arose as to the right of assessorship, and the

archbishop stated that the judgment as to jurisdiction was to be considered as his own: see also 14 P. D. 148.

of the jurisdiction in this country which has been more examined into and is better attested and confirmed. The Court, therefore, although by an entirely different line of inquiry, has arrived at the same conclusion which was arrived at on purely legal principles by the unanimous judgment of the Lord High Chancellor, with four judges and five bishops who constituted the Judicial Committee of the Privy Council to advise Her Majesty in August, 1888. The Court decides that it has jurisdiction in this case, and therefore overrules the protest."

In 1888 the Privy Council decided that the archbishop has jurisdiction to cite a bishop in respect of ecclesiastical offences, and that an appeal lies to Her Majesty in Council from his refusal to exercise such jurisdiction <sup>(1)</sup>.

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<sup>(1)</sup> *Ex parte Read and Others*, 13 P. D. 221. The Privy Council declined to express an opinion whether the archbishop had or had not a discretion whether he would issue the citation.

## TABULAR VIEW OF THE ECCLESIASTICAL DIVISIONS OF PARISHES FORMED UNDER THE CHURCH BUILDING ACTS AND NEW PARISHES ACTS, ETC.

### (A) UNDER THE CHURCH BUILDING ACTS <sup>(1)</sup>.

#### 1. CONSOLIDATED CHAPELRIES :

**ACTS AND SECTIONS.**—8 & 9 Vict. c. 70, s. 9; 14 & 15 Vict. c. 97, ss. 19 and 20; 1 & 2 Vict. c. 107, s. 14; 59 Geo. 3, c. 134, s. 6; see 34 & 35 Vict. c. 82.

**How FORMED.**—By scheme and Order in Council.

**CONSENTS NECESSARY.**—The Bishop and the patrons or a majority of the patrons of the several parishes affected by the division.

**ENDOWMENTS.**—The permanent endowments of the parishes, &c., out of which the Consolidated Chapelry is taken are not affected by the division; but the rector or vicar of any such parish may annex tithes to the new church, or effect a rent-charge on his living in favour of the minister of such church (1 & 2 Wm. 4, c. 45, s. 21; and 1 & 2 Vict. c. 107, s. 14).

**OFFICES OF THE CHURCH, AND FEES.**—The offices of the Church may, upon the formation of the consolidated chapelry, be performed in the church thereof without any order; the fees being reserved to the incumbents of the several original parishes, &c., during their respective incumbencies, or until avoidance, or relinquishment of the fees (8 & 9 Vict. c. 70, ss. 10, 14, 15, *i.e.*, as regards those formed after this Act passed).

**PEW RENTS.**—If the Commissioners make a grant in aid of building the new church, they can fix a scale of pew-rents for it (58 Geo. 3, c. 45, ss. 63, 64).

**RELATION OF THE NEW TO THE OLD CHURCH.**—The minister of the new church is independent, except as to the fees he is to account for, as previously mentioned (8 & 9 Vict. c. 70, s. 9).

**PATRONAGE OF THE NEW CHURCH AND DIVISION.**—This was settled by the patrons or a majority of the patrons of the several parishes, &c., affected (8 & 9 Vict. c. 70, s. 9), but this is now altered by 34 & 35 Vict. c. 82, which see.

**REPAIRS OF NEW CHURCH.**—May be provided for by church rates levied on the inhabitants of the district, pursuant to the 31 & 32 Vict. c. 109, s. 6.

<sup>(1)</sup> The provisions of the Church Building Acts contained in the Tabular View, Dale, pp. 328, 329, with regard to district and separate parishes, and

also as to district parishes, are now practically superseded, and are consequently here omitted.

**2. DISTRICT CHAPELRIES :**

**ACTS AND SECTIONS.**—59 Geo. 3, c. 134, s. 16; 1 & 2 Vict. c. 107, s. 12; 2 & 3 Vict. c. 49, s. 3; 3 & 4 Vict. c. 60, s. 1.

**How FORMED.**—By scheme and Order in Council.

**CONSENTS NECESSARY.**—The Bishop.

**ENDOWMENTS.**—The permanent endowments of the parishes, &c., out of which the district chapelry is taken are not affected by the division, but the rector or vicar of any such parish may annex tithes to the new church, or effect a rent-charge on his living in favour of the minister of such division (1 & 2 Wm. 4, c. 45, s. 21).

**OFFICES OF THE CHURCH, AND FEES.**—The Commissioners, with the bishop's consent only, determine whether all or any of the offices of the Church may be performed in the new church, and how the fees should be appropriated until the avoidance of the mother church or relinquishment of the fees by the incumbent of the mother church. Generally all the offices are authorized and the fees go to the incumbent (59 Geo. 3, c. 134, s. 16).

**PEW RENTS.**—If the Commissioners make a grant in aid of building the new church, they can fix a scale of pew-rents for it (58 Geo. 3, c. 45, ss. 63, 64).

**RELATION OF THE NEW TO THE OLD CHURCH.**—The minister of the district is independent, except as to any fees he may have to account for to the old church by the Order in Council assigning the district (8 & 9 Vict. c. 70, s. 17).

**PATRONAGE OF THE NEW CHURCH AND DIVISION.**—Unless vested elsewhere, the patronage belongs to the incumbent of the mother church (8 & 9 Vict. c. 70, s. 23). But if the division be altogether out of an extra-parochial place, then the patronage belongs to the bishop (1 & 2 Vict. c. 107, s. 15).

**REPAIRS OF NEW CHURCH.**—May be provided for by church-rates levied on the inhabitants of the district, pursuant to the 31 & 32 Vict. c. 109, s. 6.

**3. PARTICULAR AND PATRONAGE DISTRICTS :**

**ACTS AND SECTIONS.**—1 & 2 Wm. 4, c. 31, ss. 10, 11; 14 & 15 Vict. c. 97, ss. 14, 16, 21.

**How FORMED.**—By the Ecclesiastical Commissioners, under their common seal.

**CONSENTS NECESSARY.**—The bishop, the patron, and incumbent of the mother church having notice and an option to build and endow the church.

**ENDOWMENTS.**—A permanent endowment to the satisfaction of the commissioners is required (14 & 15 Vict. c. 97, s. 7; 1 & 2 Wm. 4, c. 38, s. 5), 1000*l.* at least, at 40*l.* a year rent-charge.

**OFFICES OF THE CHURCH, AND FEES.**—The commissioners and the bishop determine the offices.

The fees are reserved until avoidance to the incumbent of the mother parish; but he may, with the consent of the patron, voluntarily surrender the same (1 & 2 Wm. 4, c. 38, s. 14; 3 & 4 Vict. c. 60, s. 18; 7 & 8 Vict. c. 56, ss. 1, 2; 14 & 15 Vict. c. 67, s. 18).

**PEW RENTS.**—The commissioners may fix or allow the bishop and patron or trustee to fix pew rents.

**RELATION OF THE NEW TO THE OLD CHURCH.**—The minister of the district is independent of the mother church, except as to the fees, dues, &c., which may have been reserved (2 & 3 Vict. c. 49, s. 10).

**PATRONAGE OF THE NEW CHURCH AND DIVISION.**—The patronage is vested in the body or person building and endowing, or their nominees (14 & 15 Vict. c. 97, s. 11).

**REPAIRS OF NEW CHURCH.**—A repair fund is always provided for the church. The inhabitants may levy church-rates pursuant to the 31 & 32 Vict. c. 109, s. 6.

## (B) UNDER THE PLURALITY AND RESIDENCE ACT—

### 1. SEPARATE OR DISUNITED BENEFICES:

**ACTS AND SECTIONS.**—1 & 2 Vict. c. 106, s. 26; and 2 & 3 Vict. c. 94, ss. 6, 7, 8.

**HOW FORMED.**—By the scheme of the archbishop and Order in Council.

**CONSENTS NECESSARY.**—Archbishop, bishop, patrons, and incumbents of the parishes affected by the scheme. If the incumbents do not consent, the division does not take place till the avoidance of the survivor of them.

**ENDOWMENTS.**—A portion of glebe, tithes, &c., may be given up under the scheme.

**OFFICES OF THE CHURCH, AND FEES.**—The fees, &c., for offices may be given up under the scheme.

**PEW RENTS.**—Arranged under the scheme.

**RELATION OF THE NEW TO THE OLD CHURCH.**—The new church becomes a distinct benefice, and the district a separate parish for ecclesiastical purposes immediately on the Order in Council being gazetted, if the incumbents consent; if not, then upon the avoidance.

**PATRONAGE OF THE NEW CHURCH AND DIVISION.**—Arranged under the scheme.

**REPAIRS OF NEW CHURCH.**—Arranged under the scheme, but regulated by the 31 & 32 Vict. c. 109.

## (C) UNDER THE NEW PARISHES ACTS—

### 1. PEEL PARISHES AND DISTRICTS:

**ACTS AND SECTIONS.**—6 & 7 Vict. c. 37, ss. 9, 11, 12; 7 & 8 Vict. c. 94, s. 10; 19 & 20 Vict. c. 104, ss. 1, 2, 3, 14.

**HOW FORMED.**—By scheme and Order in Council.

**CONSENTS NECESSARY.**—The bishop; but a copy of the scheme is sent to the patron and incumbent (6 & 7 Vict. c. 37, s. 9).

**ENDOWMENTS.**—No endowment is necessary, provided an adequate maintenance from other sources is reasonably to be expected (19 & 20 Vict. c. 104, s. 3). If not, then an endowment is required of at least 100% a year to be increased to 150% on its becoming a new parish (6 & 7 Vict. c. 37, s. 9).

**OFFICES OF THE CHURCH, AND FEES.**—Unless or until a church is consecrated in and for the district, the incumbent performs only such pastoral duties and offices as are specified in his license, viz., churchings and baptisms; no fee can be taken for baptisms, and for churchings only the fees specified in his license (6 & 7 Vict. c. 37, s. 13). No burials or marriages can be performed (sect. 11).



**PEW RENTS.**—The Ecclesiastical Commissioners, with the consent of the bishop, may authorize pew-rents (if sufficient funds cannot be provided from other sources) in districts formed after the 29th of July, 1856 (19 & 20 Vict. c. 104, s. 6; 6 & 7 Vict. c. 37, s. 24).

**RELATION OF THE NEW TO THE OLD CHURCH.**—The incumbent of the district is a perpetual curate, but is not otherwise independent unless or until a church is consecrated in and for the district, when it becomes a new parish (6 & 7 Vict. c. 37, ss. 12, 14).

**PATRONAGE OF THE NEW CHURCH AND DIVISION.**—The commissioners may assign the patronage, either in perpetuity or otherwise, to contributors to the endowment, or to the incumbent of the mother parish. In the meantime the Crown and the bishop nominate alternately (6 & 7 Vict. c. 37, s. 20; 19 & 20 Vict. c. 104, ss. 16, 23).

**REPAIRS OF NEW CHURCH.**—Immediately a church is built in the district and consecrated, the district becomes a new parish, and the liabilities to repair are the same as in an ancient parish church, and there is no liability to repair the mother church.

## 2. NEW PARISHES:

**ACTS AND SECTIONS.**—6 & 7 Vict. c. 37, s. 14; 19 & 20 Vict. c. 104, ss. 1, 2, 14, 15.

**HOW FORMED.**—By scheme and Order in Council; but in case of an existing district other than a Peel district, wherever the incumbent has a right to perform, and to receive the fees for, the offices of the church (other than for burials), thereupon the district becomes a new parish without any consents. <sup>(1)</sup>

**CONSENTS NECESSARY.**—The bishop's consent in the case of a district formed under 19 & 20 Vict. c. 104, s. 1, is necessary; but no consents are requisite where an existing district becomes a new parish, as previously mentioned.

**ENDOWMENTS.**—Optional with the Ecclesiastical Commissioners to require an endowment or not. In existing districts other than a peel district, no additional endowment is required.

**OFFICES OF THE CHURCH, AND FEES.**—The incumbent and the parish are ecclesiastically independent of the mother parish, and the incumbent is exclusively entitled to perform all the offices of the Church and to take all the fees (19 & 20 Vict. c. 104, s. 15). The publication of the banns of marriage and the solemnization of marriage are ecclesiastical purposes within the meaning of this Act. Accordingly the incumbent of a "new and separate" parish has the exclusive right of solemnizing marriages in the case of persons resident in his parish and of receiving the fees. The incumbent of the mother parish has no right to solemnize such marriage in the church of the mother parish, or to receive the fees for the same: *Fuller v. Alford*, 10 Q. B. D. 418. The burial of the dead is also an ecclesiastical purpose, and when a district which has a burial-ground becomes a separate and distinct parish for ecclesiastical purposes, the inhabitants of such new parish cease to have any right of burial in the burial-ground of the old parish: *Hughes v. Lloyd*, 22 Q. B. D. 157.

<sup>(1)</sup> But this does not apply to those patronage districts in which the right to solemnize marriages is only acquired

by a revocable license: *Queen v. Perry*, 30 L. J. (Q.B.) 141.

**PEW RENTS.**—The Ecclesiastical Commissioners may authorize pew-rents in any new parish formed since July 29th, 1856.

**RELATION OF THE NEW TO THE OLD CHURCH.**—The incumbent is the perpetual curate, and has exclusive cure of souls, and is ecclesiastically independent of the incumbent of the mother parish (19 & 20 Vict. c. 104, s. 15).

**PATRONAGE OF THE NEW CHURCH AND DIVISION.**—The Ecclesiastical Commissioners may (except in existing districts of which the patronage is vested elsewhere) assign the patronage, either in perpetuity or otherwise, to contributors to the endowment or to the incumbent of the mother church. In the interim the Crown and the bishop nominate alternately (6 & 7 Vict. c. 37, s. 20; 19 & 20 Vict. c. 104, ss. 16–23).

**REPAIRS OF NEW CHURCH.**—The new parish is in the same position as to its own church-rate as an ancient parish, and is not liable to rates for the mother church (19 & 20 Vict. c. 104, s. 15).

## BOOK XIII.

### CRIMINAL LAW.

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#### CHAPTER I.

##### INTRODUCTORY.

Criminal law, or "Pleas of the Crown" <sup>(1)</sup>, as it is called in English jurisprudence, is concerned with crimes or public wrongs and their punishment.

A crime may be defined as "an act forbidden by law under pain of punishment." A chief point of distinction between crimes (or public wrongs) and torts (or mere private wrongs), is to be found in the method of procedure by which redress is obtained <sup>(2)</sup>.

Definition  
of crime.

The procedure in the case of a crime is at the suit of the Crown; in the case of a tort at the suit of the individual.

When a tort is committed the sanction of the law is imposed entirely for the sake of the injured party. Its enforcement is in his discretion (or in that of his representative), and for his advantage. In the case of a crime the punishment is imposed for public purposes, and has no direct reference to the interests of the person injured by the act punished. Punishments are thus sanctions, but they are sanctions imposed for the public, and at the discretion and by the direction of those who represent the public <sup>(3)</sup>.

Distinc-  
tions  
between  
crime and  
tort.

<sup>(1)</sup> So called because the sovereign is supposed by law to be the person injured by every wrong done to the community. Blackstone, vol. iv. p. 2.

<sup>(2)</sup> Harris's *Principles of Criminal Law*, p. 2, *et seq.*; Stephen's *General View of the Criminal Law of England*, 2nd ed. p. 1, *et seq.*, where it is pointed out that some things which in other countries are treated as matters of civil administration, are dealt with in England as offences against the criminal law and the law of nuisances, under which civil obligations, *e.g.*, to repair a road, &c., are enforced by indictment is given as an illustration.

It may be mentioned that the word "crime" is usually confined to indictable offences. Breaches of the law punishable only by courts of summary jurisdiction are generally spoken of merely as "offences."

<sup>(3)</sup> In crimes the punishment is inflicted, or as it is sometimes expressed, the sanction is imposed for the public benefit, and is enforced or remitted at the discretion of the sovereign body as the representative of the public, such discretion being exercised according to law: Harris's *Criminal Law*; Austin's *Jurisprudence*.

Felonies  
and mis-  
demean-  
ours.

Crimes are divided by English law into the three classes of treasons (*post*, p. 1173), felonies, and misdemeanours <sup>(1)</sup>.

The old division into felonies and misdemeanours is still, for many purposes, of much practical importance. Felony comprises every species of crime which at common law incurred the forfeiture of lands and goods. Many crimes unknown to the common law are made felony by statute. All other indictable crimes are misdemeanours.

In cases of misdemeanour the power of arrest without warrant is more circumscribed than in felony. A person charged with a misdemeanour is entitled as of right to bail upon committal for trial, whereas in felony bail is discretionary. On the other hand, a person accused of felony has a right to challenge "peremptorily," *i.e.* without assigning any cause, twenty of the jury panel, a right not extended to those charged with misdemeanour. Other distinctions between felonies and misdemeanours, which may be here noticed, are that there is no suspension of civil rights until prosecution in the case of a misdemeanour, as it is said there is in the case of a felony <sup>(2)</sup>, and that in the case of conviction of a misdemeanour a prisoner is not asked, as in the case of a felony, whether he has any reason why sentence should not be passed upon him according to law.

Although forfeiture for felony is now abolished by the 33 & 34 Vict. c. 23, yet by sect. 2 of that statute any prisoner convicted of such crime and sentenced to death, penal servitude, or imprisonment with hard labour for not less than twelve months, loses any public employment, ecclesiastical benefice, emolument in any university, college, or other corporation, or public pension he may hold, unless indeed the Queen grant <sup>(3)</sup> him a free pardon within a certain period.

Punish-  
ments.

As frequent reference must be made to the punishments which are inflicted, it may be convenient here to notice the various punishments which are inflicted by the English law <sup>(4)</sup>. These are :—

<sup>(1)</sup> Criminal law is to a very large extent a creature of statute. About one half of the criminal law is, says Mr. Justice Stephen, contained in different statutory enactments, and half of this half is comprised in what are known as the Consolidation Acts of 1861. These collectively form the nearest approach that exists in English law to a penal code. They are five in number, namely : 24 & 25 Vict. c. 96 (Larceny); 24 & 25 Vict. c. 97 (Malicious Mischief); 24 & 25

Vict. c. 98 (Forgery); 24 & 25 Vict. c. 99 (Coinage); 24 & 25 Vict. c. 100 (Offences against the person).

<sup>(2)</sup> See *Ex parte Leslie*, 20 Ch. D. 131 and the cases there cited, and see as to statutory exception under Lord Campbell's Act, *ante*, p. 497.

<sup>(3)</sup> *Hay v. Justices of the Tower Hamlets*, 24 Q. B. D. 561.

<sup>(4)</sup> Harris' Criminal Law, 5th ed. p. 545, *et seq.* Stephen's Digest, 4th ed. 4.

Punish-  
ments.

- (1.) Death (by hanging);
- (2.) Penal servitude, the shortest term of which is five years.
- (3.) Imprisonment, which may be: (1) with hard labour; (2) without hard labour; (3) as a first-class misdemeanant. Imprisonment under the first and second heads may in certain cases be accompanied (or not) by solitary confinement, which may not be for any longer period than one month at a time, or more than three months in the space of one year.
- (4.) Detention in a reformatory school.
- (5.) Subjection to police supervision.
- (6.) Whipping (if a male).
- (7.) Fines which consist in ordering the offender to pay the Queen a certain sum of money, but this even, when no particular sum is limited by the law as a maximum, must not be excessive. <sup>(1)</sup>

(8.) Putting the offender under recognizances, *i.e.* the offender enters into an obligation to the Crown with or without sureties to pay a certain sum, the condition of the obligation being that if he appears in Court on a certain day, and meanwhile keep the peace, the recognizance shall be void. The Court may order the offender to be imprisoned until he enters into his recognizance, and finds the sureties, if required.

The essential ingredients of a crime are (1) Will; (2) Criminal intention or malice, sometimes spoken of as *mens rea*. <sup>Essential ingredients of a crime.</sup>

Motive is not in itself an essential ingredient in crime, it may serve as a clue to the intention, but it is intention that determines whether the nature of the act willed be criminal or innocent <sup>(2)</sup>. It seems formerly to have been held that a person could not be convicted of an attempt to commit an offence which he could not actually commit. Thus it was decided that where a man puts his hand into another's pocket, and there was nothing in the pocket which he could steal, he could not be convicted of an attempt to steal <sup>(3)</sup>. But this would seem to be no longer law <sup>(4)</sup>.

#### PERSONS CAPABLE OF COMMITTING CRIME.

It should be observed that the foundation of all English criminal law is the "Queen's peace" <sup>(5)</sup>. It is the breach of the Queen's peace that is punishable; consequently, to make an act criminal, it must be committed by a natural-born, or naturalized

<sup>(1)</sup> This principle was recognised in Magna Charta, which directed that fines should be inflicted *salvo contentamento suo*.

<sup>(2)</sup> Harris, p. 12.

<sup>(3)</sup> *Reg. v. Collins*, L. & C. 471; 33 L. J. M. C. 177.

<sup>(4)</sup> *Reg. v. Brown*, 24 Q. B. D. 357.

<sup>(5)</sup> See Cherry's Growth of Criminal Law, Lecture VI.

subject of this Crown, or if done by a foreigner, by a foreigner owing at least what is called "local allegiance." Local allegiance is due where an alien comes on to British territory, and so receives British protection. The territorial waters of Great Britain are British territory for this purpose <sup>(1)</sup> so is a British merchant ship on the high seas, or a British man-of-war anywhere. Moreover, the act must be committed wilfully by a person claiming allegiance, but within the limits of the Queen's peace.

Thus an Englishman may steal in France, and if he can escape to England be perfectly secure; for he cannot be punished here, and he will not be extradited to France, for no state (save Switzerland) extradites its own subjects. Some offences, however, such as murder, are *by statute* punishable here if committed by an Englishman anywhere.

A few other leading principles of the criminal law of England may here be noticed.

"The governing rule and principle of English criminal law, is that the question in this country is not as it is in many countries abroad, simply whether the person charged is guilty or not guilty, but whether the prosecution proves the case strictly and in form" <sup>(2)</sup>.

The general policy of the law is that no man can be compelled to criminate himself <sup>(3)</sup>.

Every man is presumed in law to be responsible for his acts until the contrary is shewn, and it lies on a person accused of crime to rebut this presumption.

<sup>(1)</sup> By statute 41 & 42 Vict. c. 73, passed in consequence of the famous case of *Reg. v. Keyn* (sometimes spoken of as the *Franconia Case*), L. R. 2 Ex. Div. 63; 13 Cox, 403; *Reg. v. Carr*, 15 Cox, 131; and *Reg. v. Carr* (2), *ib.* 129.

<sup>(2)</sup> Per Lord Esher in *Cotterill v. Lemprière*, 24 Q. B. D. 634, 639, where the Court proceeded on the principle that where a man is convicted under a statute which creates an alternative offence, and the same penalty is imposed in either case, the information and conviction must state which offence is intended to be charged.

<sup>(3)</sup> See Broom's Legal Maxims, under head "*Nemo tenetur seipsum prodere*." A change has been introduced by the Bankruptcy Act, 1890, s. 27, which repeals a provision con-

tained in 24 & 25 Vict. c. 96, and enacts that agents, bankers, factors, &c., may be convicted of the misdemeanours mentioned in sects. 75 to 84 of 24 & 25 Vict. c. 96, though the person charged shall "have first disclosed the same in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy or insolvency." The second sub-section provides on the principle *nemo tenetur seipsum prodere*, that a statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to in the said sect. 85.

The principal classes of cases of irresponsibility for crime fall under the following two heads: Irrespon-  
sibility for  
crime.

1. Absence of will, *i.e.* where the act is involuntary.
2. Absence of criminal intention.

Under the first head fall accident and compulsion, under the second head fall insanity, infancy, ignorance, and necessity.

## CHAPTER II.

## ACCIDENT AND COMPULSION, &amp;c.

Accident.

In order to make accident a complete excuse for an act which would otherwise be a crime, it must have happened in the performance of a lawful act with proper caution. Suppose A., a brick-layer, while pursuing his calling lets fall a brick which strikes and kills B. A.'s act is not a crime, if at the time he was acting with due caution; otherwise if A. is doing an unlawful act or is not using due caution <sup>(1)</sup>.

Duress.

*Duress*, i.e. actual physical compulsion or threats of immediate death or grievous bodily harm (termed *duress per minas*), is an excuse for crime, if continued during the whole of the time when the act is being done <sup>(2)</sup>, but *duress per minas* affords no defence to a charge of murder.

A married woman who commits certain crimes, *in the presence of her husband*, is presumed, in English law, to have acted under his immediate *duress* or coercion, and is excused from punishment on that ground. The presumption may, however, be rebutted if the circumstances of the case shew that the wife was principally instrumental in the commission of the crime and acted voluntarily.

The principle does not apply to such crimes as are heinous in their character or dangerous in their consequences, such as high treason and murder; neither does it apply to the case of offences connected with the government of the house in which the wife has a principal share, e.g. the offence of keeping a disorderly house.

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<sup>(1)</sup> The unlawful act in this case must it seems be *malum in se*, and not merely *malum prohibitum*: 4 Steph. Com. 31.

<sup>(2)</sup> The threats must be of such a character as to cause a just and well-

grounded fear to a reasonably brave man of present death or grievous bodily harm, a fear "*qui cadere possit in virum constantem non timidum et meticulosum*" (Bracton).



## INSANITY.

The law with regard to insanity was made the subject of most careful consideration in 1843, in the case of *R. v. McNaghten* <sup>(1)</sup>, and the answers of the judges to the questions proposed to them by the House of Lords in this case (in which the important principle was established that the House of Lords has a right to require the judges to answer abstract questions of existing law), are still the leading authority on the subject. It was there laid down that notwithstanding that the party did the act complained of, an act in itself criminal, under the influence of insane delusion with a view of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he was, nevertheless, punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law. If the accused was conscious that the act was one which he ought not to do, and if as a fact the act was at the same time contrary to law, he was punishable for treason and felony. The jury ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. A person labouring under a partial delusion must be considered in the same situation as to responsibility as if the facts in respect of which the delusion existed, were real <sup>(2)</sup>.

The subject was illustrated by the judges as follows: If, under the influence of delusion, a man supposes another to be in the act of attempting to take his life and he kills that man as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury he would be liable to punishment.

(1) 10 Cl. & F. 200.

(2) A medical man who has been present in Court and heard the evidence may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, shew a state of mind incapable

of distinguishing between right and wrong, but may not be asked whether on the evidence he regards the prisoner as sane or insane, for that would be making him judge of the truth of the evidence, a question solely for the jury.

It must, however, be borne in mind that if a man commits a crime and subsequently becomes insane before trial he cannot be tried while in that condition. Even if sentence has been pronounced, and the prisoner then becomes insane, execution must be stayed.

#### INFANCY.

A child under seven years of age is considered in English law to be *doli incapax*, i.e. incapable of committing a crime. If the child be over seven and under fourteen years of age, it must be proved affirmatively that it is *doli capax*, i.e. that it has a "mischievous discretion"—a knowledge that the act was wrong.

Over the age of fourteen years an infant is as a rule in no way protected by his infancy from responsibility for crime. In certain cases, however, omissions to perform a duty, which would constitute crimes in persons of full age, are in an infant excused, by reason of his presumed inability to perform it; e.g. an omission to repair a bridge or high road which it is the infant's duty to repair.

#### DRUNKENNESS.

Drunken-  
ness.

Drunkenness is no excuse for crime, but rather an aggravation of it. However, a disease of the mind, such as delirium tremens, will excuse a man though voluntarily produced<sup>(1)</sup>. Thus, if a man in a fit of delirium tremens caused by voluntary drunkenness, kills another mistaking him for a wild beast about to attack him no crime is committed.

#### IGNORANCE.

Ignorance  
of law.

Ignorance of law is no excuse, if the person who commits the crime has capacity to understand the law, e.g. if an offence be committed by a foreigner in England or in an English ship on the high seas, it is no excuse that he is ignorant of English law<sup>(2)</sup>.

Ignorance  
of fact.

Ignorance of *fact* is an excuse for crime, when the person who commits the act, in good faith and on reasonable grounds, believes such a state of fact to exist as would justify the act.

(1) If the existence of a specific intention is essential to the commission of a crime, the fact that the offender was drunk when he did the act, which, if coupled with that intention, would constitute such crime, should be taken into account by the jury in deciding whether he had that intention: Stephen's Digest, 4th ed. p. 22.

(2) Arch. 20th ed. p. 27, where the authorities are cited. Ignorance of the law may, however, be relevant to the question whether an act which would be a crime if accompanied by a certain intention or other state of mind, and not otherwise, was in fact accompanied by that intention or state of mind or not: Stephen's Digest, 4th ed. p. 26; and see *Reg. v. Bayley*, R. & R. 1.

Thus, if one intending to prevent the commission of some forcible and atrocious crime, or to prevent the escape of a red-handed felon, by mistake kill an innocent onlooker, he is excused. And if a man or woman reasonably believes his wife or her husband, even although not continually absent from her for seven years, to be dead, and marries again, he or she cannot be convicted of bigamy <sup>(1)</sup>.

#### NECESSITY.

Is necessity an excuse for crime? The general principles of the criminal law on this subject are thus stated by Mr. Justice Stephen:—

“An act which would otherwise be a crime, may, in some cases, be excused, if the person accused can shew that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the end arrived at” <sup>(2)</sup>.

The law on the subject of necessity as an excuse for crime was very carefully considered in a case which attracted a very large share of public attention <sup>(3)</sup>.

The jury at the trial, at the suggestion of the judge, found a special verdict <sup>(4)</sup>, to the following effect, that the prisoners, who were able-bodied seamen, and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat; that the boat was drifting on the ocean, and was probably more than 1000 miles from land: that on the eighteenth day, when they had been seven days without food, and five without water, one of the seamen proposed to the other that lots should be cast who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy that their lives might be saved; that on the twentieth day one of them, with the assent of the other, killed the boy, and both of them fed on his flesh for four days; that at the time of the act there was no sail in sight, nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability

<sup>(1)</sup> *Reg. v. Tolson*, 23 Q. B. D. 168.

<sup>(2)</sup> *Stephen's Digest*, 4th ed. p. 24.

<sup>(3)</sup> *The Queen v. Dudley and Stephens*, 14 Q. B. D. 273.

<sup>(4)</sup> In a special verdict the facts are found by the jury, and the Court subsequently pronounces as to the legal effect and significance.

that unless they then or very soon fed upon the boy, or one of themselves, they would die of starvation.

The Court decided upon these facts that there was no proof of such necessity as to justify the prisoners, and that they were guilty of murder. The sentence was afterwards commuted by the Crown to six months' imprisonment. The Lord Chief Justice, in delivering judgment, said :—

“It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than any one of the grown men? The answer must be ‘No.’

‘So spake the Fiend, and with necessity,  
The tyrant's plea, excused his devilish deeds.’ (1)

“It is not suggested that in this particular case the deeds were ‘devilish,’ but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime” (2).

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(1) Milton's *Paradise Lost*, Book IV.

(2) *The Queen v. Dudley and Stephens*, 14 Q. B. D. 273, 287.

## CHAPTER III.

## PERSONS CAPABLE OF COMMITTING CRIME.

The sovereign is not amenable to the criminal courts of his kingdom for any act committed by him. This rule of law is expressed by the constitutional maxim "The king can do no wrong."

The sovereign.

"The sovereign," says Blackstone (1), "is not under the coercive power of the law, which will not suppose him capable of committing a folly, much less a crime. We are, therefore, out of reverence and decency, to forbear any idle inquiries of what would be the consequence if the king were to act thus and thus; since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do anything inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance."

Corporations may be indicted and fined for offences committed in their corporate capacity, *e.g.* neglecting to repair a high-road (2), ordering a libel to be published (3).

Corporations.

Persons implicated in the commission of a crime are either "principals," or "accessories." 1. Principals are either principals in the first degree or principals in the second degree. Accessories are either accessories before the fact or accessories after the fact. The distinction between principals and accessories exists only in respect of felonies. In treasons, on account of the magnitude of the offence, and in misdemeanour, all the guilty parties are treated as principals.

Principals and accessories.

A principal in the first degree is one who is the actor or actual perpetrator of the fact, whether actually present at the commission of the crime or not. Thus, A. lays poison, intending to kill B.; B. takes the poison and dies; A. is guilty of murder as a principal in the first degree.

Principals in the first degree.

(1) Blackstone, vol. iv. *ad init.*, citing Hale's Pleas of the Crown.

(2) *R. v. Birmingham and Gloucester Railway Co.*, 9 C. & P. 469; 2 Q. B. 47.

(3) *Eastern Counties Co. v. Broom*,

6 Exch. 314. They can only be prosecuted in the Queen's Bench Division of the High Court; for only in that Court can defendants in criminal cases appear and plead by attorney.

Principals  
in the  
second  
degree.

Accessory  
before the  
fact.

Accessory  
after the  
fact.

Illustra-  
tion.

A principal in the second degree is one who is present, aiding and abetting, at the commission of the fact.

An accessory before the fact is he who, being absent at the time of the felony committed, "procures, counsels, commands or abets" another to commit the felony.

An accessory after the fact is one who, knowing a felony to have been committed by another, "receives, relieves, comforts, or assists" the felon.

A married woman, however, who receives, comforts, or relieves her husband, knowing him to have committed a felony, does not thereby become an accessory after the fact <sup>(1)</sup>.

Thus suppose A. and B. plan a burglary, A. takes C. with him to keep watch while the offence is being committed. A. commits the burglary; and D., with knowledge of the crime, conceals A. from the pursuit of justice. Here A. is principal in the first degree, C. is principal in the second degree, B. is accessory before the fact, and D. is accessory after the fact.

Accessories before the fact may be indicted, tried, and convicted, and punished in all respects as if they were principal felons <sup>(2)</sup>.

Accessories whether before or after the fact may be tried as such together with the principal, or after his conviction, or may be charged with a substantive felony, whether the principal shall have been convicted or not <sup>(3)</sup>.

Every one who would have been an accessory whether before or after the fact if the principal offence had been a felony, is a principal in either treason or misdemeanour.

Having thus briefly considered the general nature of crimes, their punishments, and the persons by whom they may be committed, we shall next proceed to consider crimes under the following classes:—

1. Treason and Offences against Government (*post*, p. 1173).
2. Offences against the Law of Nations (*post*, p. 1176).
3. Offences against Public Order (*post*, p. 1178).
4. Offences against Public Justice (*post*, p. 1182).
5. Offences against Religion (*post*, p. 1186).
6. Offences against Public Morals (*post*, p. 1188).
7. Offences against the Person (*post*, p. 1189).
8. Offences against Property (*post*, p. 1195).

<sup>(1)</sup> Stephen's Digest, 4th ed. p. 36.

s. 35; c. 100, s. 67.

<sup>(2)</sup> 24 & 25 Vict. c. 94, s. 1; c. 96,  
s. 98; c. 97, s. 56; c. 98, s. 49; c. 99,

<sup>(3)</sup> See 24 & 25 Vict. c. 94, ss. 1,  
2, 3; *Reg. v. James*, 24 Q. B. D. 439.

## CHAPTER IV.

## TREASON AND OFFENCES AGAINST GOVERNMENT.

The earliest statutory definition of treason is contained in 25 Edw. 3, st. 5, c. 2 (passed in the year 1351, and intended to be declaratory of the then state of the common law), where treason is stated to be committed :—

Statutory  
definition  
of treason.

“When a man doth compass or imagine the death of our lord the king <sup>(1)</sup>, or of our lady his queen, or of their eldest son and heir; or if a man do violate the king’s companion, or the king’s eldest daughter unmarried, or the wife of the king’s eldest son and heir; or if a man do levy war against our lord the king in his realm, or be adherent to the king’s enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be proveably attainted of open deed by people of their condition.”

The statute proceeds to enumerate other acts of treason, counterfeiting the king’s great seal, bringing false coin into the realm, slaying any of the following persons, viz., the chancellor, treasurer, king’s justices of either bench, justices in eyre, or justices in assize, and all other justices assigned to hear and determine, being in their places doing their offices.

By statutes of Anne it is made treason to endeavour to deprive or hinder any person next in succession to the Crown according to the Act of Settlement from succeeding thereto (provided the same be directly or maliciously attempted by any overt act); or to maliciously, advisedly and directly, by writing or printing, maintain and affirm that any other person has any right or title to the Crown otherwise than according to the said Act; or to so maintain and affirm that Parliament may not make laws to bind the Crown and the descent thereof <sup>(2)</sup>; finally, by 36 Geo. 3, c. 7 (made perpetual by 57 Geo. 3, c. 6),

<sup>(1)</sup> “King” includes a Queen Regnant; but does not include her consort even although invested with the crown matrimonial: 1 Hall, P. C. 101, 106; 3 Inst. 7; *R. v. Oxford*,

9 C. & P. 525.

<sup>(2)</sup> 1 Anne, st. 2, c. 17, s. 3; 6 Anne, c. 7; *R. v. Matthews*, State Trials, ix. 680.

Treason.

“if any person shall, within the realm or without, compass, imagine, or intend death, destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the powers of the king, his heirs and successors; and shall express, utter, or declare such intention by publishing any printing or writing, or by overt act, he shall be adjudged a traitor.”

It should be observed that the king is the king *de facto*, and not the king *de jure*, and no person can be guilty of treason by adhering to and attending the king *de facto*, though he be not the king *de jure* <sup>(1)</sup>.

Although it is the “compassing and imagining” that constitutes the crime, yet the design must be evidenced by at least one overt act, and to justify a conviction there must be two witnesses to the same act, or separate acts of the same treason, unless the accused willingly confesses his guilt <sup>(2)</sup>.

The crime of treason by imagining the Queen’s death has been thus defined. Every one commits high treason who forms and displays by any overt act, or by publishing any printing or writing, an intention to kill or destroy the Queen, or to do her any bodily harm tending to death or destruction, mayhem or wounding, imprisonment or restraint. Under this head fall intentions evidenced by overt act: (1) to depose the Queen; (2) to levy war against the Queen; (3) to instigate any foreigner with force to invade this realm or any other of the Queen’s dominions.

Levying war against the Queen may consist either in attacking the Queen’s military forces in a warlike manner, or attempting by means of a violent insurrection to compel the Queen to change her measures, or to intimidate either House of Parliament <sup>(3)</sup>.

Words written and published expressing treasonable designs are overt acts of treason; the mere speaking of such words, unless spoken as words of advice, consultation, &c., connected with the execution of treasonable design <sup>(4)</sup>, or accompanied by conduct connected with the execution of such a design, is not treason.

By exception from the usual rule of criminal law, *Nullum*

<sup>(1)</sup> 11 Hen. 7, c. 1.

<sup>(2)</sup> 7 & 8 Wm. 3, c. 3, ss. 2, 4.

<sup>(3)</sup> It is not a “levying of war against the Queen” to attack even in a warlike manner any private individual, for the purpose of inflicting upon him a private wrong. In *R. v. Gallagher and Others*, 15 Cox,

291, it was held that war might be levied by a few persons using dynamite explosions with a treasonable object: *The Queen v. Deary*, 15 Cox, 334.

<sup>(4)</sup> Stephen’s Digest, 4th ed. pp. 43, 44, citing Foster, 341 to 346.



*tempus occurrit regi*, it is provided by statute <sup>(1)</sup> in the case of Treason. treason that no person shall be prosecuted but within three years after commission of the offence, except only in the case of a designed assassination of the sovereign. The punishment of treason is death by hanging.

Treason is frequently spoken of as "high" treason to distinguish it from an old offence of *petit treason*, which was where a wife murdered her husband, a servant his master, or an ecclesiastical person his superior <sup>(2)</sup>. But such crimes are now murder only <sup>(3)</sup>.

Side by side with the common law offence of treason Treason felony. (regulated and defined as it has been by statute), the legislature has in the present reign created a new felony which covers much of the same ground. This is the crime constituted by 11 & 12 Vict. c. 12, and in common parlance called "treason-felony." That Act provides that if any person shall, within the United Kingdom or without <sup>(4)</sup>, compass, imagine, invent, devise, or intend to deprive or depose the Queen, her heirs or successors, from the style, honour, or royal name of the Imperial Crown of the United Kingdom, or of any of Her Majesty's dominions and countries; or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, both Houses or either House of Parliament <sup>(5)</sup>; or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other of Her Majesty's dominions or countries under the obedience of Her Majesty, her heirs or successors; and shall express, utter, or declare such compassings, imaginations, inventions, devices or intentions, or any of them, by publishing any printing or writing, or by any overt act or deed, the person so offending shall be guilty of felony. The punishment is penal servitude for life or any term not less than five years, or

<sup>(1)</sup> 7 & 8 Wm. 3, c. 3.

<sup>(2)</sup> 25 Edw. 3, c. 2; 1 Hale, P. C. 380; 4 Bl. Com. 203. The punishment for *petit-treason* was for *men*, to be drawn on a hurdle and hanged; for *women*, to be drawn and burnt.

<sup>(3)</sup> 9 Geo. 4, c. 31; 24 & 25 Vict. c. 100, s. 8.

<sup>(4)</sup> "Any person" means, of course, any person owing either natural or local allegiance. A foreigner never coming on to British territory in the

course of doing acts, which in an Englishman would be within the statute, could not be punished here under this Act, although he *subsequently* came within the jurisdiction.

<sup>(5)</sup> It is a "levying war" within this statute to conspire to cause dynamite explosions with such an object as the Act sets forth. See *Reg. v. Gallagher & Others* (15 Cox, 291).

Treason  
felony.

imprisonment with or without hard labour for any term not exceeding two years. A person shall not be entitled to be acquitted under this Act because his offence amounts to treason; but no person tried for the felony shall afterwards be prosecuted upon the same facts for treason.

It may be observed that by 5 & 6 Vict. c. 51, presenting arms (loaded or not) at the Queen, striking at her, or attempting to throw anything at her person, or producing any arms or explosive or dangerous matter near her person, with intent in any of these cases to injure or alarm her, is punishable with penal servitude or imprisonment, and also (if the Court so direct) with not more than three whippings.

Speaking or writing against the sovereign or "doing anything which may tend to lessen him in the esteem of his subjects," is a high misdemeanour at common law and punishable with fine, imprisonment, and whipping.

#### OFFENCES AGAINST THE LAW OF NATIONS.

Piracy.

The offence of piracy consists in committing those acts of robbery and depredation upon the high seas and within the jurisdiction of the Admiralty <sup>(1)</sup>, which, if committed upon land, would have amounted to felony there <sup>(2)</sup>.

It is an essential of the offence that the acts should be committed against her Majesty's subjects, or against foreigners at amity with this country <sup>(3)</sup>.

With regard to the punishment for piracy, Mr. Justice Stephen says: Whoever commits piracy, by the law of nations, is liable (it seems) to the same punishment as if the act constituting piracy had been committed within the body of an English county.

Piracy  
with  
violence.

With regard to the aggravated offence of piracy with violence, it is provided that whoever with intent to commit, or at the time of, or immediately before or after committing, the crime of piracy, shall assault with intent to murder, or stab, or wound, or unlawfully do any act by which the life of any person may be endangered, is liable to suffer death as a felon <sup>(4)</sup>.

Piracy by  
statute.

Many acts of a piratical nature have been made piracy by statute. The following are the principal:—

<sup>(1)</sup> 1 Russ. 144; see *Attorney-General of Hong Kong v. Kwok-a-Sing*, 5 P. C. 179, 199.

<sup>(2)</sup> 4 Steph. Dig. 4th ed. pp. 74,

75; Arch. 20th ed. p. 487.

<sup>(3)</sup> Harris's Criminal Law, p. 42.

<sup>(4)</sup> 1 Vict. c. 88, ss. 2, 3.

It is piracy for a natural-born subject to attack another subject on the high seas under colour of a commission from a foreign power <sup>(1)</sup>; or in time of war to "adhere to" or assist an enemy at sea <sup>(2)</sup>; to forcibly board any vessel and throw cargo over board <sup>(3)</sup>; being a commander of a ship or seaman, to run away with his ship or voluntarily to yield to pirates <sup>(4)</sup>; to favour pirates, or to trade, conspire, or correspond with them <sup>(5)</sup>.

Piracy.

To engage in the slave trade is by 5 Geo. 4, c. 113, punishable with penal servitude for fourteen years or imprisonment with hard labour for five years.

Slave trade.

The Foreign Enlistment Act <sup>(6)</sup> provides that, if any person within the limits of her Majesty's dominions, and without the licence of her Majesty . . . prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue :—

Foreign Enlistment Act.

(1) Every person engaged in such preparation, or fitting out or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by either fine or imprisonment, or both these punishments, at the discretion of the Court before which the offender is convicted, and imprisonment, if awarded, may be either with or without hard labour.

(2) All ships and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to her Majesty.

In a recent case it was decided that the offence of fitting out and preparing an expedition within the Queen's dominions against a friendly State under this Act was sufficiently constituted by the purchase of guns and ammunition in this country, and their shipment for the purpose of being put on board a ship in a foreign port with a knowledge of the purchaser and shipper that they were to be used in a hostile demonstration against the foreign State in question, even though the shipper took no part in any overt act of war, and the ship was not fully equipped for the expedition within any port belonging to the Queen's dominions <sup>(7)</sup>.

This important statute also, it may be observed, constitutes a variety of other offences, besides that which was the subject of this judicial decision. It is, for example, an offence within

<sup>(1)</sup> 11 & 12 Wm. 3, c. 7, s. 7.

<sup>(2)</sup> 18 Geo. 2, c. 10.

<sup>(3)</sup> 8 Geo. 1, c. 24, s. 1.

<sup>(4)</sup> 11 & 12 Wm. 3, c. 7, s. 8.

<sup>(5)</sup> 8 Geo. 1, c. 24, s. 1.

<sup>(6)</sup> 33 & 34 Vict. c. 90, s. 11.

<sup>(7)</sup> *Reg. v. Sandoval*, 56 L. T. 526.  
35 W. R. 500; 51 J. P. 709; 16 Cox  
C. C. 206.

the Act to enlist in the service of any foreign state at war with any friendly state, or to leave Her Majesty's dominions with intent to serve such a state, and to do a variety of other acts prohibited by the enactment in question. In most cases, however, Her Majesty may grant a licence to do any of the things otherwise forbidden.

Ambas-  
sador.

The persons of ambassadors are held sacred by English law, and accordingly a statute of the reign of Queen Anne <sup>(1)</sup> deals with persons prosecuting, soliciting, or executing writs or process, whereby the person of any ambassador or his domestic servant may be arrested or his goods distrained or seized, in a very remarkable manner; for it provides that such persons shall be deemed violators of the law of nations and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the Lord Chancellor and the Lord Chief Justice of England and the Lord Chief Justice of the Common Pleas, or any two of them, shall think fit.

#### OFFENCES AGAINST PUBLIC ORDER.

Amongst crimes specially directed against the peace and public order, may be mentioned the offences of challenging a person to fight a duel <sup>(2)</sup>, provoking another with intent to cause a duel <sup>(3)</sup>; going armed in a public place to the terror of the inhabitants <sup>(4)</sup>; taking part in affrays, illegal assemblies, routs, and riots <sup>(5)</sup>.

Affray.

An affray is the fighting of two or more people in a public place to the terror of her Majesty's subjects <sup>(6)</sup>.

An unlawful assembly is a meeting of three or more persons (a) with intent to commit a crime by open force; or (b) with intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it <sup>(7)</sup>.

<sup>(1)</sup> 7 Anne, c. 12. This Act was passed in consequence of the ambassador of Peter the Great being arrested on "mesne process." All process against an ambassador or his domestic servant is declared void by the statute. The powers of the Lord Chief Justice of the Common Pleas are now vested in the Lord Chief Justice of England by the Judicature Act, 1881, s. 25.

<sup>(2)</sup> Russ. Cr. 418.

<sup>(3)</sup> *R. v. Phillips* 6 East, 463. See, as to prize fights, *Reg. v. Coney*,

8 Q. B. D. 534; and see article in *Law Gazette*, Oct. 23, 1890.

<sup>(4)</sup> 2 Edw. 3, c. 3.

<sup>(5)</sup> See Chaster on the Executive, p. 150, *et seq.*

<sup>(6)</sup> 1 Russ. Cr. 406.

<sup>(7)</sup> Stephen's Digest, pp. 49, 50. The law of unlawful assembly was much considered by Mr. Justice Charles in the case of *Reg. v. Graham & Burns* (16 Cox, 420), a case which arose out of the prohibited Trafalgar Square meetings.

A rout is an unlawful assembly which has made a motion towards the execution of its common purpose. Rout.

The subject of the right of public meeting has recently attracted much attention, and the principles on which the law is based have been summed up as follows:— Right of public meeting.

From the right of A. to walk along the street, and the rights of B. C. D. and ten thousand others to do the same, our law allows the corollary that ten thousand, or even a larger number of persons, may march through the streets together, provided they do so in an orderly and peaceable manner.

An individual has (in absence of special circumstances) a strictly legal right to walk along any street, and a man does not lose this right by taking a part in a procession unless the procession is treasonable, riotous, or otherwise criminal.

There is also a strictly legal right to hold a meeting in a field, providing that the permission of the owner or occupier has first been obtained. Such a meeting may fairly be called a public meeting, if it be open to the general public.

There is not, however, an absolute unlimited right of public meeting; but the law would seem to be that public meetings are in themselves lawful but subject to reasonable conditions, and that it is for the Court to decide whether or not a particular assembly was unlawful, and whether those who took part in it have committed an offence <sup>(1)</sup>.

A riot is an unlawful assembly, which has actually begun to execute the purpose for which it assembled, by a breach of the peace, and to the terror of the public <sup>(2)</sup>.

Serious riots are specially dealt with by a statute passed in the year 1700, commonly called the Riot Act <sup>(3)</sup>, which provides that persons unlawfully, riotously, and tumultuously assembled, to the number of twelve or more, if they continue together for one hour after the reading of the proclamation contained in the Act, by which they are ordered to disperse, are guilty of felony, and are punishable with penal servitude for life as a maximum penalty. The Riot Act.

It is also a felony, punishable in the same manner, to prevent the reading of the proclamation.

There must be at least twelve persons present when the proclamation is read, and at least twelve must continue together for an hour after being so commanded to disperse, or there is no felony. The reading of the proclamation to the rioters, which

<sup>(1)</sup> The law as to public meeting, by J. W. Blagg, where the question is carefully discussed.

<sup>(2)</sup> Stephen's Digest, 4th ed. p. 50.

<sup>(3)</sup> 1 Geo. 1, st. 2, c. 5. By the original Act the felony was *capital* and without benefit of clergy, and so continued until 1837.

Reading  
the Riot  
Act.

thus creates a statutory felony, is usually known and spoken of as "reading the Riot Act."

This may be read by a justice of the peace, the sheriff of the county, or his under sheriff, or by the mayor, bailiff or bailiffs, or other head officer or justice of the peace of any city or town corporate, where such assembly shall be.

Attempt-  
ing to  
overawe  
Parlia-  
ment.

A well-known Act of Parliament passed in the year 1817 <sup>(1)</sup> makes special provision so as to render the deliberations of Parliament free from anything in the nature of coercion by popular assemblies held in the neighbourhood of Westminster, with the object of influencing its decisions.

Every meeting is an unlawful assembly which consists of more than fifty persons, and is held in any street, square, or open place, in the city or liberties of Westminster, or county of Middlesex, within a mile from the gate of Westminster Hall, and out of the parish of St. Paul's, Covent Garden, for the purpose or on the pretext, of considering or preparing any petition or address to the Queen, or to both Houses, or either House of Parliament, for alteration of matters in Church or State, on any day on which either House of Parliament meets, sits, or is summoned, or adjourned, or prorogued to meet or sit, or on which the High Court of Justice, or any decision or judge thereof, sits at Westminster Hall.

It is, however, expressly provided that the statute shall not extend to any meeting held for the election of members of Parliament, or to persons attending upon the business of either House of Parliament, or the said Court, or any of its Divisions or judges.

Bigamy.

Another offence classed under the heads of offences against public order is *bigamy*. This is committed when a man or woman, who has been legally married, goes through the ceremony of marriage a second time in the lifetime of his or her undivorced husband or wife respectively <sup>(2)</sup>.

The second ceremony must be one which is valid in point of form according to the law of the place where it is cele-

<sup>(1)</sup> 57 Geo. 3, c. 19, s. 23. Mr. Justice Stephen points out that the words referring to the former Courts of Justice, are rendered inoperative by the removal of the Courts to the Royal Courts of Justice. The words "county of Middlesex" must, it is apprehended, be applied to that portion of the new county of London which is north of the Thames.

<sup>(2)</sup> 24 & 25 Vict. c. 100, s. 57. The offence is not committed if the

husband or wife of the person going through the ceremony shall have been continuously absent for seven years preceding the second ceremony, and shall not be known to such person to be alive within that time. Nor is it committed, as has been noticed above, when the person going through the ceremony *bonâ fide* and upon reasonable grounds believes his wife or her husband to be dead: *Reg. v. Tolson*, 23 Q. B. D. 168.

brated (1). It may be noticed that a British subject commits Bigamy. this offence, although the second ceremony be abroad.

The law on this subject may be illustrated as follows:— If A. who has purported to marry B. (a person within the prohibited degrees of affinity) marries C. in B.'s lifetime, A. does not commit bigamy, the first ceremony being illegal; but if A., being legally married to B., goes through the form of marriage with C. (a person within the prohibited degree of affinity) in B.'s lifetime, A. commits bigamy, though the second ceremony would in point of fact be invalid, if A. were unmarried.

Any unmarried person who knowingly enters into a marriage which renders the other party to the marriage guilty of bigamy, is a principal in the second degree (2).

Bigamy is a felony punishable with penal servitude for seven years (3).

*Common nuisance* is the name given to a wide and somewhat vaguely defined class of offences, and has been defined as an act or omission, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all her Majesty's subjects. It is immaterial whether the act complained of is more convenient to a larger number of the public than its inconveniences; but the fact that the act complained of facilitates the lawful exercise of their rights by part of the public may show that it is not a nuisance to any of the public (4). Common nuisance.

Public nuisances are opposed to private nuisances, which annoy particular individuals only, that is, to which all persons are not liable to be exposed. It is a question for the jury whether the number of persons who are, or may be, affected, is large enough to make the nuisance "common" or "public" (5).

*Keeping a disorderly house* is a common nuisance; disorderly houses are common bawdy houses, common gaming houses, common betting houses, and disorderly places of amusement.

Many other instances of common nuisances might be enumerated, e.g., obstructing a highway, or omitting to repair it, when it is a person's duty so to do; carrying on dangerous or offensive trades, keeping a lottery, exposing in public a person suffering from infectious disease, and, in general, anything which is an appreciable injury to the public at large (6). Common nuisances.

(1) *Burt v. Burt*, 29 L. J. (Prob.) 133

(2) *R. v. Brown & Webb*, 1 C. & K. 144.

(3) 24 & 25 Vict. c. 100, s. 57.

(4) Steph. Dig. 4th ed. p. 125.

(5) For the distinction between a common or public nuisance, and a private nuisance, *vide ante*, p. 581.

(6) Harris's Crim. Law, p. 140; Arch. Crim. Pl., 20th ed., 1017, *et seq.*

Vagrancy.

*Vagrancy* is an offence of which persons are convicted by Courts of Summary Jurisdiction.

The term "vagrant" is held to include three classes of persons: 1. Idle and disorderly persons; 2. Rogues and vagabonds; 3. Incurable rogues.

1. Amongst the first class may be mentioned beggars in public places, disorderly prostitutes, hawkers or pedlars without a licence, and able-bodied paupers. These, on conviction, may be imprisoned for one month.

2. Rogues and vagabonds are persons who commit any of the above offences a second time, and a large number of other offenders of a like character, specified by various statutes.

3. Incurable rogues are persons convicted a second time of an offence which brings the doer into the second category above given <sup>(1)</sup>. In this last case, although the offender is to be tried and convicted before the Court of Summary Jurisdiction, he must be sent to the sessions for punishment.

Drunken-  
ness.

Drunkenness is itself regarded as an offence in English law, and is punished on summary conviction with various degrees of severity according to the circumstances of the case.

By two statutes of James I. drunkenness, *per se*, is punishable by a fine of 5s. for the first offence. In case of a second offence the offender may be bound with two sureties in £10 for good behaviour <sup>(2)</sup>.

Persons found drunk in any street or public thoroughfare, building, or other place, or on any licensed premises, are liable to a penalty of 10s. for the first offence, 20s. and 40s. for the second and third time within twelve months.

If whilst drunk a person is guilty of riotous or disorderly behaviour, or is in charge of any carriage, horse, cattle, or steam-engine, or is in possession of any loaded fire-arms, the penalty is 40s. or imprisonment for one month <sup>(3)</sup>.

#### OFFENCES AGAINST PUBLIC JUSTICE.

It is a misdemeanour for a public officer, in the exercise or under colour of exercising the duties of his office, to do any illegal act, or abuse any discretionary power given him by law from an improper motive.

An illegal exercise of authority, caused by a *bonâ fide* mistake as to the law, is not, however, a misdemeanour.

<sup>(1)</sup> 5 Geo. 4, c. 83, amended by s. 3.  
1 & 2 Vict. c. 38.

<sup>(3)</sup> 35 & 36 Vict. c. 94, s. 12.

<sup>(2)</sup> 4 Jac. 1, c. 5; 21 Jac. 1, c. 7,



If the illegal act consists in taking under colour of office from any person any money or valuable thing which is not due from him at the time when it is taken, the offence is called "extortion."

Extortion.

If it consists in inflicting upon any person any bodily harm, imprisonment, or other injury, not being extortion, the offence is called "oppression" <sup>(1)</sup>.

Oppression.

It is a misdemeanour for any person to offer to a judicial officer, or for a judicial officer to accept a bribe.

Bribery.

"Embracery" is the offence of corruptly attempting to influence a juryman to give his verdict for one side or the other in any judicial proceeding <sup>(2)</sup>.

Embracery.

"Maintenance" is the officious meddling in an action in which one has no concern, by maintaining or assisting either of the parties to the suit.

Maintenance.

"Champerty" consists in bargaining with a party to an action to give him assistance on condition of receiving a portion of the subject-matter of the action in the event of success (see *ante*, p. 389) <sup>(3)</sup>.

Champerty.

"Common barratry" is the offence of frequently inciting and stirring up quarrels between the Queen's subjects, either at law or otherwise <sup>(4)</sup>.

Common barratry.

*Compounding of felony* is the taking of reward for forbearing to prosecute a felony. It is not necessary that the person taking the reward should in fact forbear prosecuting, or that he should be the person who ordinarily would prosecute, or even a material witness <sup>(5)</sup>.

*Perjury* is the intentional swearing (or affirming where affirmation is allowed (*ante*, p. 870)) some matter of fact in a judicial proceeding before a competent jurisdiction which is relevant to the issue then depending, but which the person swearing (or affirming) either does not believe to be true or of which he knows himself to be ignorant <sup>(6)</sup>.

Perjury.

This statement of the law, it will be observed, involves five points.

<sup>(1)</sup> Stephen's Digest, 4th ed. pp. 83, 84.

<sup>(2)</sup> 6 Geo. 4, c. 50, s. 61.

<sup>(3)</sup> The law with regard to this subject is much considered in *Bradlaugh v. Newdegate*, 11 Q. B. Div. 1.

<sup>(4)</sup> After nearly two centuries of oblivion an indictment was preferred for this misdemeanour at the Guildford Summer Assizes, 1889. *Reg. v. Bellgrove* (*Times*, July 8, 1889). The

defendant was, however, convicted of another offence, and it was not thought necessary to proceed upon this charge.

<sup>(5)</sup> *Reg. v. Burgess*, 16 Q. B. D. 141, a case in C. C. R. which overruled *Rez v. Stone*, 4 C. & P. 379.

<sup>(6)</sup> Stephen's Digest, 4th ed. p. 95, *et seq.*; Archbold's Criminal Pleading, 20th ed. p. 920, *et seq.*

## Perjury.

1. The oath, or affirmation, must be taken in a judicial proceeding. Thus it has been decided that perjury may be committed in a hearing before an arbitrator, in an inquiry before a sheriff as to damages, in justifying bail in any Court, in proceedings before a local marine board under the Merchant Shipping Act, 1854.

2. It must be before a competent jurisdiction. If the oath or affirmation be taken before a person who had no lawful authority to administer it, or was without jurisdiction in the matter, there cannot be perjury.

In a case which came before the Court for Crown Cases Reserved, the prisoner had been convicted of perjury, alleged to have been committed in an examination by "the Court," under section 27 of the Bankruptcy Act (*ante*, p. 915). The prisoner had been summoned before a County Court having jurisdiction in bankruptcy. The oath was administered in Court by the registrar, and then the registrar remained in Court, and the examination took place in a room used for the purpose of examinations. The examination in fact, as the Lord Justice put it, proceeded in what had been called the "legal presence" of the registrar, but certainly in his actual absence. The Court decided that there had been no valid examination by the Court within the meaning of the provisions in the Bankruptcy Act, and that accordingly the conviction must be quashed <sup>(1)</sup>.

3. The perjury must be material to the matter before the Court.

If a man swear that A. B. beat another with a certain weapon, and it turn out that he beat him with a different kind of weapon, this is not perjury, "for all that was material was the battery."

Thus perjury cannot be assigned upon evidence given to show provocation <sup>(2)</sup> but no justification for an assault. On the other hand, perjury can be assigned upon "cross-examination to credit" or evidence called to contradict such cross-examination <sup>(3)</sup>.

4. The matter sworn to must be false, or, if true, the party must have known his ignorance of its truth. Thus, if one swear that a certain person revoked a will in his presence, if it turn out that that person, as a matter of fact, had revoked the will, but that the witness did not know it, he is guilty of perjury.

<sup>(1)</sup> *The Queen v. Lloyd*, 19 Q. B. Div. 213

<sup>(2)</sup> *R. v. Tate*, 12 Cox, 7.

<sup>(3)</sup> 2 Salk. 514; *R. v. Overton*,

2 Mood. C. C. 263; *R. v. Gibbons*, L. & C. 109. A doubt was, however, expressed as to the doctrine in *R. v. Tyson*, 11 Cox, 1, 4.

5. The perjury, upon general principles of criminal law, must be intentional, in the words of the indictment, "wilful and corrupt."

To convict of perjury there must either be two witnesses to the falsity of the statement charged, or the one witness must be corroborated by strong circumstantial evidence <sup>(1)</sup>. Perjury.  
Evidence  
required.

*Subornation of perjury* is the procuring a person to commit perjury, which perjury he actually commits in consequence of such procurement. Suborna-  
tion of  
perjury.

Perjury and subornation of perjury are misdemeanours punishable on conviction by penal servitude for a term of not more than seven years, or imprisonment with or without hard labour for not more than two years <sup>(2)</sup>.

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(1) *R. v. Shaw*, L. & C. 579; *R. v. Huxley*, D. & B. 606; *R. v. Knill*, 5 B. & Ald. 929, n.

(2) The Commissioners for Oaths Acts, 1889 (52 Vict. c. 10), enacts that whoever wilfully and corruptly swears falsely in any oath or affidavit

taken or made in accordance with the provisions of the Act shall be guilty of perjury, in every case where, if he had so sworn in a judicial proceeding before a Court of competent jurisdiction, he would be guilty of perjury.

## CHAPTER V.

## OFFENCES AGAINST RELIGION AND MORALS.

Under this head fall the crimes of apostasy and blasphemy, disturbing public worship, profaning the "Lord's Day," and the like.

Apostasy.

In regard to apostasy, a statute of William 3 <sup>(1)</sup> inflicts for the first offence the penalty of forfeiture of any office or employment, and for the second offence a much more serious punishment (viz. that of disabling the offender from suing in any Court, being guardian, executor, or administrator, rendering him incapable of any legacy or deed of gift, and also liable to imprisonment for three years without bail) upon any person or persons who, having been educated in, or at any time having made profession of, the Christian religion within the realm, shall by writing, printing, teaching or advised speaking, assert or maintain there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine authority <sup>(2)</sup>.

Blasphemous libel.

The common law with regard to *blasphemous libel* has been made the subject of consideration in two recent cases: *Reg. v. Ramsay and Foote*, and *Reg. v. Bradlaugh* <sup>(3)</sup>, which establish the following principles:—

Publications discussing, with gravity and decency and in any argumentative way, questions as to Christian doctrine or statements in the Hebrew Scriptures, and even questioning their truth, are not to be deemed blasphemous, so as to be fit subjects for criminal prosecution. Disputes of learned men, as was judicially said in a previous case, in particular controvertible points of religion are not punishable as blasphemy.

<sup>(1)</sup> 9 & 10 Wm. 3, c. 32; 9 & 10 Wm. 3, c. 35, s. 1 in the revised edition of statutes.

<sup>(2)</sup> No person can, however, be prosecuted under the Act for any words spoken, unless the information of such words shall be given upon oath within four days after such words spoken, and the prosecution for the offence must be within three months

after the information, and any person or persons convicted for the first offence can obtain a discharge from all penalties and liabilities on acknowledgment, and renunciation of the offence in the same Court within the space of four months after conviction.

<sup>(3)</sup> 15 Cox, 217, 231.

On the other hand, publications which in an indecent and malicious spirit assail and asperse the truth of Christianity or of the Scriptures in language calculated and intended to shock the feelings and outrage the belief of mankind are properly to be regarded as blasphemous libels <sup>(1)</sup>. Blasphemous libel.

The following passage from a well-known authority was cited by the Lord Chief Justice as containing a correct statement of the law: "The law interferes not with the blunders of an ignorant man who professes to teach and enlighten the rest of mankind."

"The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or sophistry calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or, what is equivalent to such an intention in law as well as morals, a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong" <sup>(2)</sup>.

An Act passed in 1812 enacts that every one commits a misdemeanour, and is liable, upon conviction thereof, to a fine of forty pounds, who wilfully and maliciously or contemptuously disquiets or disturbs any meeting, assembly, or congregation of persons <sup>(3)</sup> lawfully assembled for religious worship; or in any way disturbs, molests, or misuses any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled. Disturbing public worship.

An Act passed in 1860, which abolished the jurisdiction of the Ecclesiastical Courts, enacts that every one commits an offence punishable upon summary conviction, and is liable to a fine not exceeding five pounds, or, if the justices think fit, to imprisonment for any time not exceeding two months, who is guilty of riotous, violent, or indecent behaviour in any cathedral, church, parish or district church or chapel of the Church of England, or in any chapel of any religious denomination <sup>(4)</sup>, or in England in any place of religious worship duly certified under 18 & 19 Vict. c. 81, whether during the celebration of divine service or at any other time, or in any churchyard or burial-ground, or who molests, lets, disturbs,

<sup>(1)</sup> *R. v. Woolstan*, 2 Str. 834.

<sup>(2)</sup> *Starkie on Libel*, 4th ed. p. 559, (p. 622, 5th ed.), cited with approval in *R. v. Ramsay and Foote*, 15 Cox, 231.

<sup>(3)</sup> 52 Geo. 3, c. 155, s. 12, extended to all persons lawfully assembled for religious worship by 9 & 10 Vict. c. 59, s. 4.

<sup>(4)</sup> 23 & 24 Vict. c. 32, s. 2.

vexes, or troubles, or by any other unlawful means disquiets or misuses any preacher duly authorized to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament or any divine service, rite, or office, in any cathedral, church, or chapel, or in any churchyard or burial-ground.

#### OFFENCES AGAINST PUBLIC MORALS.

Under the head of offences against public morals may be classed the offences of public indecency, publication of obscene works, and improper omissions or commission in respect of dead bodies.

It is a misdemeanour to *indecently expose* oneself in a public place, and in the presence of more persons than one, or to publicly sell or expose for sale, or purchase for purposes of sale, any indecent or disgusting book, print, or other object<sup>(1)</sup>; to leave unburied a dead body<sup>(2)</sup>, having the means and being under a legal obligation to bury it, or to exhume it without authority.

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(<sup>1</sup>) See the Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18), which provides that summary proceedings may be taken against offenders.

(<sup>2</sup>) It is not an offence to burn a dead body unless a nuisance be created thereby: *R. v. Price*, 12 Q. B. D. 247.

## CHAPTER VI.

## OFFENCES AGAINST THE PERSON.

Homicide is the taking away of the life of a human being by a human being, and is of three kinds :—

1. Justifiable.
2. Excusable.
3. Felonious.

1. Justifiable homicide.

Homicide is justifiable in three cases <sup>(1)</sup>.

- (i.) When the proper officer, *i.e.* the sheriff or his deputy, executes a criminal in strict conformity with, and in pursuance of the sentence, legally given, of a judge of competent jurisdiction, after a regular trial.
- (ii.) Where it is sought to lawfully arrest a man or to prevent his escape from legal custody. But there must always be "apparent necessity," *i.e.*, it must be shown that a prisoner could not be secured or kept unless the homicide were committed.
- (iii.) Where the homicide is committed in prevention of a forcible and atrocious crime; as for instance, if a man attempt to rob or murder another, and be killed in the attempt, or if a man be killed in the suppression of a dangerous riot which cannot be otherwise suppressed.

Excusable homicides are of two kinds :—

- (1.) Where a man doing a *lawful* act, without any intention of hurt, by accident kills another; as for instance, where a man is working with a hatchet and the head by accident flies off and kills a person standing by, or where a parent is moderately correcting his child, or a master his apprentice or scholar, and happen to occasion death. This is called homicide *per infortunium*, or by misadventure.
- (2.) Where a man kills another upon a sudden encounter, merely in his own defence, or in defence of his wife,

<sup>(1)</sup> Steph. Dig. 4th ed. pp. 141-143.

Homicide.

child, parent or servant, and not from any vindictive feeling; which is termed homicide *se defendendo*.

Neither justifiable nor excusable homicide is now punishable. *Excusable* homicide was indeed formerly punishable by forfeiture of goods, although as early as the records reach the delinquent had always a pardon and a writ of restitution of his goods by merely paying for suing out the same; but this forfeiture was taken away by 9 Geo. 4, c. 31, and there is now no practical difference between justifiable and excusable homicide.

*Felonious homicide* is of two kinds: *Murder* (under which head falls *suicide* or felonious self-destruction) and *manslaughter*.

Murder.

Murder is thus defined or described by Lord Coke:—

“Where a person of sound memory and discretion, unlawfully killeth, any reasonable creature in being and under the king’s peace, with malice aforethought, either express or implied.”

Man-slaughter.

Manslaughter is the unlawful and felonious killing of another without any malice, either express or implied. It is of two kinds:—

1. Involuntary manslaughter, where a man doing an unlawful act not amounting to felony, or a lawful act in an unlawful manner, by accident kills another, or where a man by culpable neglect of a duty imposed upon him is the cause of the death of another.

2. Voluntary manslaughter, where, upon a sudden quarrel, two persons fight, and one of them kills the other, or where a man greatly provokes another by some personal violence, &c., and the other immediately kills him.

So where A. finds B. in the act of connection with T., A.’s wife, and immediately slays B., this is manslaughter only.

A child is considered to be in being within the meaning of the definition, when it has proceeded in a living state from the body of its mother <sup>(1)</sup>.

Malice aforethought.

The technical term “malice aforethought” has a very peculiar signification in English law. “Malice, in common acceptation, means ill-will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of *malice*, because I do it *intentionally*, and without just cause

(1) Steph. Dig. 4th ed. p. 158; Arch. Crim. Pl., 20th ed. p. 714. To kill a child *en ventre sa mère* is highly punishable, but is not murder.

It may be in certain cases allowable, as where a surgeon finds it impossible to deliver a mother of her child without killing the child.



or excuse. If I maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it of *malice*, because it is a wrongful act and done intentionally." Malice  
afore-  
thought.

And the law also raises the presumption that every man must contemplate the necessary consequences of his acts. The doctrine of "implied malice" has even been carried so far that it has usually been said that if a person in the course of committing a felony quite accidentally kill another he is guilty of murder. But great doubt has been thrown on this doctrine by Mr. Justice Stephen in the recent case of *Reg. v. Serné* <sup>(1)</sup>. Implied  
malice.

The death must take place within a year and a day from the commission of the offence, and for the purposes of this computation, the day upon which the crime was committed is counted as the first day <sup>(2)</sup>.

The killing of another is presumed to be murder until the contrary is shown, and the burden of proof lies on a person who has killed another to show circumstances of excuse, justification, &c., making the killing justifiable or excusable, or reducing it to manslaughter <sup>(3)</sup>.

*Attempts to murder* are felonies punishable by penal servitude for life as a maximum penalty <sup>(4)</sup>. Attempts  
to murder.

*Woundings and acts endangering life*, are dealt with by 24 & 25 Vict. c. 100. Woundings  
and acts  
endanger-  
ing life.

It is a felony punishable with penal servitude for life as a maximum penalty to wound or cause grievous bodily harm to any person, or to shoot at any person, or attempt to discharge any loaded arms at him, with intent to maim, disfigure, or disable, or to resist lawful apprehension or detention. Any such acts, without the intent, are highly punishable misdemeanours.

It is a felony punishable by penal servitude for life as a maximum penalty, for any woman to administer to herself, or for any other person to administer to her, a noxious drug, or to use any instrument (whether in fact she be or be not with child), with intent to procure her miscarriage; <sup>(5)</sup> and a person who procures or supplies any noxious drug or instrument knowing that the same is to be used for the above purpose is guilty of a misdemeanour and liable to five years' penal servitude. <sup>(6)</sup> Procuring  
abortion.

*Rape* is the offence of having carnal knowledge of a woman forcibly and against her consent. A husband cannot be guilty, Rape.

(1) C. C. C. Sessions Papers.

(5) 24 & 25 Vict. c. 100, s. 58.

(2) Hawk. P. C. bk. I, c. 31, s. 9

(6) 24 & 25 Vict. c. 100, s. 59. See

(3) 1 Russ. Cr. 668.

*Reg. v. Whitchurch*, 24 Q. B. D. 420.

(4) 24 & 25 Vict. c. 100.

Rape.

as a principal in the first degree, of a rape upon his wife, and a boy under the age of fourteen is conclusively presumed to be incapable of committing this crime as such a principal <sup>(1)</sup>.

By the Criminal Law Amendment Act, 1885 <sup>(2)</sup>, a man who by personating the husband of a woman induces her to have connection with him is guilty of rape.

The crime of rape is punishable with a maximum penalty of penal servitude for life <sup>(3)</sup>.

Abduction.

Another offence affecting specially the personal safety of individuals, is the *abduction of females*.

The Offences against the Person Act <sup>(4)</sup> provides "that where any woman of any age shall have any interest (whether legal or equitable, present or future, absolute, conditional or contingent) in any real or personal estate, or shall be heiress or co-heiress, or presumptive next-of-kin to any one having such interest, it shall be felony in any person who shall from motives of lucre take away or detain her against her will with intent to marry or carnally know her, or who with the like intent shall fraudulently allure, take away, or detain any such woman who shall be under the age of twenty-one years, out of the possession and against the will of her father or mother, or other person having the lawful care or charge of her; and the offending party in any of the above cases is liable to penal servitude for fourteen years, and is moreover incapable of taking any part of her property which is to be settled as may be decreed by the Court of Chancery.

In these cases the wife is a competent witness either for or against the husband.

The same penalty attaches to the forcible taking away or detaining against her will, a woman of any age with intent to marry or carnally know her, or to cause her to be married, or carnally known <sup>(5)</sup>.

It is a misdemeanour punishable with imprisonment for two years, unlawfully to take any unmarried girl under the age of sixteen years out of the possession and against the wish of her father, mother, or any person having lawful charge of her; <sup>(6)</sup> and it is no defence for the prisoner to show that he believed on reasonable grounds that the girl was over that age <sup>(7)</sup>.

<sup>(1)</sup> The consent of the woman must be unforced, and must be to the act of connection, and not given under a mistake to something else: *R. v. Flattery*, 2 Q. B. D. 410.

<sup>(2)</sup> 48 & 49 Vict. c. 69, s. 4.

<sup>(3)</sup> 24 & 25 Vict. c. 100, s. 48.

<sup>(4)</sup> *Ibid.* s. 53.

<sup>(5)</sup> *Ibid.* s. 54.

<sup>(6)</sup> 24 & 25 Vict. c. 100, s. 55.

<sup>(7)</sup> *R. v. Prince*, 2 C. C. R. 154.

To take a girl under eighteen out of the possession and against the will of her father or mother or other person having lawful charge of her, with intent that she shall be carnally known, is a misdemeanour, punishable with imprisonment for any term not exceeding two years, with or without hard labour <sup>(1)</sup>. In this case (unlike the offence of abduction noticed above) it is expressly provided that it shall be an answer if the person charged make it appear that he had reasonable cause to believe the girl eighteen or over.

The Criminal Law Amendment Act, 1885 <sup>(2)</sup>, enacts a variety of stringent provisions for the protection of women and girls, directed against procuration and procuring defilement of a woman or girl by threats, fraud, or the use of drugs, &c. Defilement of a girl under thirteen years of age is made a felony punishable with penal servitude for life, or for any term not less than five years, or imprisonment for any term not exceeding two years with or without hard labour (sect. 4).

Criminal  
Law  
Amend-  
ment Act,  
1885.

The defilement, or attempted defilement, of a girl between thirteen and sixteen years of age, or of any female idiot, or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, is a misdemeanour.

An important alteration in the law of evidence is made with regard to charges of defilement or attempted defilement of girls under thirteen. Sect. 4 of the Act provides that where, upon the hearing of a charge under *that* section, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the Court or justices, understand the nature of an oath, the evidence may be received, though not given upon oath, if in the opinion of the Court or justices, as the case may be, the witness is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. The reception of the evidence so admitted is however hedged in by two safeguards: (I.) No person shall be liable to be convicted of the offence unless the testimony admitted by virtue of the section in question, and given on behalf of the prosecution, shall be corroborated by some other material evidence in support thereof, implicating the accused: (II.) Any witness whose evidence has been admitted under the section shall be liable to indictment

Alteration  
in law of  
evidence.

<sup>(1)</sup> *R. v. Wealand*, 20 Q. B. D. 202; *R. v. Owen*, 20 Q. B. D. 829. 827; and see *R. v. Paul*, 25 Q. B. D.

<sup>(2)</sup> 48 & 49 Vict. c. 69.

and punishment for perjury in all respects as if he or she had been sworn.

An Act entitled the Prevention of Cruelty to and Protection of Children Act, 1889 <sup>(1)</sup>, renders it a misdemeanour punishable with fine and imprisonment for any person over sixteen years of age, having the custody, control, or charge of a child, being a boy under fourteen, or a girl under sixteen, to wilfully ill-treat, neglect, abandon, or expose the child, or cause or procure the child to be ill-treated, neglected, abandoned, or exposed in a manner likely to cause unnecessary suffering or injury to the health.

Common  
assault.

A common assault is an unlawful attempt or offer coupled with the present power of carrying it into effect, to apply the least actual force to the person of another directly or indirectly. A. shakes his fist at B. A. commits an assault. Thus it is an assault to strike *at* another with a cane, with a stick, or with the fist; to draw a sword or bayonet; to throw a bottle or glass with intent to wound or strike; or present a loaded gun at a man within shooting distance; or to point a pitchfork at him when within reach of that weapon.

An assault is also committed by depriving a person of his liberty without his consent. No mere words, however insulting, or provocative, can constitute an assault.

Battery.

A battery is where actual force is applied to the person of another directly or indirectly. A. throws a stone *at* B., and misses him; A. is guilty of a common assault; the stone strikes B.; A. is guilty of assault and battery. There can be no assault or battery where the person assaulted or beaten consents.

Defences to  
charge of  
battery.

Among the defences to a charge of battery may be mentioned (1) proof that the alleged battery happened by misadventure. Thus, to quote the illustration cited by Mr. Archbold, if a horse run away with his rider, and run against a man it is no battery <sup>(2)</sup>; (2) that the alleged battery was merely an amicable contest; or (3), the correcting of a child by its parent, or a pupil by his master, &c., or that the alleged battery was committed in self-defence.

Common assaults are often disposed of summarily by the magistrates.

Assaults causing actual bodily harm are punishable in a more serious manner, viz., by penal servitude for a maximum term of five years <sup>(3)</sup>. The offences of wounding, &c., have been noticed above.

<sup>(1)</sup> 52 & 53 Viet. c. 44.

*Gibbons v. Pepper*, 2 Salk. 637.

<sup>(2)</sup> Archbold, 20th ed. p. 754, citing

<sup>(3)</sup> 24 & 25 Viet. c. 100, s. 37.

## CHAPTER VII.

## OFFENCES AGAINST PROPERTY.

*Larceny* may be defined as the wilfully wrongful taking possession and carrying away of the personal goods of another with intent to deprive the owner of his property in them <sup>(1)</sup>. Larceny.

Possession extends not only to those things which we hold in our hands but to things in our house, upon our land, or in the custody of our servants or agents. Property has been defined as the right to possession coupled with an ability to exercise that right <sup>(2)</sup>.

A person is said to have a *special property* in a thing when the true owner has given him a right of possession as against himself <sup>(3)</sup>.

A very remarkable case on the subject of larceny <sup>(4)</sup> which excited considerable interest has been recently decided. The prisoner offered to lay odds against different horses at a race meeting. The prosecutor deposited 5s. with the prisoner, who told him that if the horse he backed won, he would receive 35s. back besides his own 5s.

The prosecutor admitted in cross-examination that he would have been satisfied if he did not receive back the particular coins he so deposited, but only others of equal value. The horse, on which the bet had been made, won the race, but the prisoner departed without handing over any money. The Court decided that the prisoner was guilty of larceny.

The prosecutor, said the Court, deposited the money with the

<sup>(1)</sup> Arch. Crim. 20th ed. p. 733, *et seq.*, and see *Reg. v. James*, 24 Q. B. D. 439.

<sup>(2)</sup> See for an elaborate analysis of the terms "possession" and "property," Stephen's Digest, 4th ed. p. 221, *et seq.*

<sup>(3)</sup> See Stephen's Digest, 4th ed. p. 224.

<sup>(4)</sup> *The Queen v. Buckmaster*, 20 Q. B. D. 182. The Court considered

the facts in the present case somewhat similar to those in *Oliver's Case*, where the prisoner offered to procure gold for the prosecutor in exchange for bank notes, whereupon the prosecutor put down £35 in notes for the purpose of receiving back the same amount in gold, and the prisoner took up the notes and went out of the house with them, promising to return immediately with the gold, but did not return.

prisoner, not intending to part with the property, for he was to have his money back in a certain event, whereas the prisoner, when he received the money, never intended to give it back in any event.

It is settled law that if the owner of goods or money parts with the possession, and does not intend to pass the property, and there is at the time an intention to steal in the mind of the person who obtains the possession, that is evidence of larceny.

Larceny.

Larceny is either simple or compound, and compound larceny differs from simple larceny solely in the circumstances of aggravation with which it is attended.

Let us consider shortly the ingredients of the offence.

(a) The kind of things which may be the subject of larceny.

(b) The wilfully wrongful taking possession.

(c) The carrying away.

(d) The intent to deprive the owner of his property in the goods taken.

(a) The things must be the *personal* goods of another, and therefore at common law it was not larceny to steal anything connected with land, such as trees, minerals, fixtures, or even title-deeds. The remedy in such cases was by civil action. It was however larceny at common law to steal things severed from the realty, *e.g.* mown grass. At the present day, however, the taking of most things that can by possibility be taken and carried away, has been, by statute <sup>(1)</sup>, made punishable, although generally still not the subject of larceny.

Choses in action at common law were not the subjects of larceny, but now, by statute, to steal, or for any fraudulent purpose to obliterate or destroy valuable securities (other than title-deeds of land <sup>(2)</sup>) is a felony of the same nature and degree and punishable in the same manner as if the offender had stolen any chattel of the like value <sup>(3)</sup>.

Certain other things were by common law excluded as not being the subjects of property at all. Among these may be mentioned, animals *feræ naturæ* and unreclaimed. But now, by 24 & 25 Vict. c. 96, stealing any of these animals is a statutable offence. It is no offence, apart from statute, to steal even a domesticated animal unfit for human food. The only animal of this kind dealt with by statute is the dog. To steal a valuable Persian cat is not punishable by law.

<sup>(1)</sup> 24 & 25 Vict. c. 96.

c. 96, s. 28.

<sup>(2)</sup> As to which see 24 & 25 Vict.

<sup>(3)</sup> *Ibid.* s. 27.

(b). The wrongful taking may be either—

Larceny

1. Actual, where the thief actually takes the goods out of the possession of the owner by force or stealth.
2. Constructive, where the owner delivers the goods not intending to part with the legal possession thereof, or where the possession is obtained by fraud, the owner not intending to part with the property in them and the taker having at the time an intention to steal them. <sup>(1)</sup>

Where the right of property as well as the possession passes on delivery of the goods, there is no larceny, though the delivery of the goods was secured by means of fraud, though the taker may be guilty of obtaining by false pretences <sup>(2)</sup>. Thus, if A. sells goods to B. on credit, B. cannot be charged with larceny, though he never intended to pay; for A. parts with the possession and the property in the goods.

Where, however, some device is employed to get possession of the goods, the owner not intending to part with the property in them, while the taker intends at the time to steal them, the taking is larceny; but it should be noted that the felonious intent must be present in the mind of the thief at the time of taking, for if the first taking be innocent and the taker subsequently resolves to steal the article, there is no larceny <sup>(3)</sup>.

With regard to goods found, the rule of law is that if the finder at the moment of taking does not really believe that the owner can be found, the taking is no larceny though the finder subsequently discover the true owner and still retain the goods <sup>(4)</sup>.

(c) The taking must be not only a handling of the goods *contrectatio*, but an actual removal of them from the portion of space formerly occupied.

Though a slight removal (or *asportation* as it is called) will suffice, there must be such a severance of the object as for the time being to give the taker absolute control over them, and so in a case where a person took goods which were fastened to a counter with a string and carried them as far as the string would allow, he was acquitted of larceny <sup>(5)</sup>.

<sup>(1)</sup> Archbold, 20th ed. p. 380, *et seq.*

<sup>(2)</sup> *Post*, p. 1199.

<sup>(3)</sup> The last proposition, however, must be taken with the qualification that if the first taking amounts to a trespass, the crime of larceny will be committed by subsequent appropria-

tion of the goods, even though no such intent were present at the first taking.

<sup>(4)</sup> *R. v. Thurborn*, 18 L. J. (M.C.) 140; 2 C. & K. 831.

<sup>(5)</sup> 1 Stephen's Digest, 4th ed. p. 224; 2 East, P. C. 556.

Larceny.

(d) The intent must be permanently to deprive the owner of property in the goods; there must be the *animus furandi* existent at the time of taking the goods. Thus, no taking under a *bonâ fide* claim of right, however unfounded it may in fact be, is larceny. The taking need not be *lucri causâ*: thus where A. took B.'s horse and killed it by backing it into a coal-pit, in order to screen an accomplice who was indicted for horse-stealing, it was held to be larceny <sup>(1)</sup>.

*Compound larceny* presents the same features as the simple offence, but in addition there are various circumstances of aggravation arising either from the character of the goods stolen, *e.g.*, goods in process of manufacture, goods in wrecked ships, or in ships in dock, or from the character of the taking, *e.g.*, robbery with violence.

K. handed to the prisoner a sovereign, believing it to be a shilling and not a sovereign, upon the terms that the prisoner should hand back a shilling to him when he (the prisoner) was paid his wages. At the time the sovereign was so handed to the prisoner he honestly believed it to be a shilling. Some time afterwards the prisoner discovered that the coin he had received was a sovereign and not a shilling, and he then and there fraudulently appropriated it to his own use. The prisoner was convicted of larceny of the sovereign. Seven judges were of opinion that the conviction was right; seven that it was wrong; and the Court, proceeding on the principle *presumitur pro negante*, *viz.* that the onus of proof lay on the appellant, upheld the conviction <sup>(2)</sup>.

Two prisoners by a series of tricks, commonly known as "ringing the changes," managed to fraudulently induce a barmaid to pay over a sovereign of her master's money without receiving the proper change for it.

The jury specially found that "the barmaid had no intention to part with the property in the sovereign except for full change of the prisoners' money, and that her master had given her no authority to part with it for other than for full consideration." But it was contended, that as the barmaid had general authority to act for her master in such a matter as giving change, and as the transaction was complete before she discovered the fraud, that therefore the property in the

<sup>(1)</sup> *R. v. Cabbage*, R. & R. 292.

<sup>(2)</sup> *The Queen v. Ashwell*, 16 Q. B. D. 195; and see *the Queen v. Flowers*, 16 Q. B. D. 643. This first

case, however, cannot be quoted as an authority, and should the point again arise it should again be reserved.



money had passed, and that the prisoners could not be convicted of stealing it.

The Lord Chief Justice, in delivering the judgment of the Court, said: I cannot see if a person goes into a place and fraudulently, by a series of tricks, obtains possession of property from another, which that other has no intention of parting with, how the offence can fail to be larceny. It is clearly stealing <sup>(1)</sup>.

*Embezzlement* is the unlawful appropriation to his own use by a clerk or servant of chattels, money, or valuable security, received by him for his employer or master. The crime of embezzlement differs from larceny in that it is committed in respect of property which is *not* at the time in the actual or legal possession of the owner. The offence consists in receiving the goods under a lawful title and unlawfully appropriating them.

Embezzle-  
ment.

To obtain a conviction for embezzlement it must be proved—

(1.) That the prisoner was a clerk or servant. (2.) That he received the goods, &c., for or in the name of or on account of his master. (3.) That he unlawfully appropriated them. It is a question for a jury to decide whether the accused is a clerk or servant within the meaning of the Act <sup>(2)</sup>.

On an indictment for larceny a prisoner may be convicted of embezzlement and *vice versâ* <sup>(3)</sup>.

In larceny the owner has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in *false pretences* the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud <sup>(4)</sup>.

False  
pretences.

The pretence must be wholly or partially of an existing fact. It is, accordingly, not an offence within the Act for a person to pretend that he will do something which he has no intention of doing, *e.g.* that he will pay for goods on delivery, or that if he gets certain money he will pay his rent thereout; but the promise to do a thing in the future may involve a false pretence, for which an indictment will lie, that the person who makes the promise has the power to do what he promises <sup>(5)</sup>.

Moreover, it is a misdemeanour for any person in incurring a debt or liability to obtain credit by false pretences or other fraud <sup>(6)</sup>.

The offence of receiving stolen goods, knowing them to be

(1) *R. v. Hollis*, 12 Q. B. D. 25, 26. 20th ed. p. 389.

(2) *R. v. Negus*, L. R. 2 C. C. R. 34. (3) *R. v. Giles*, 34 L. J. (M.C.) 50.

(3) 26 & 27 Vict. c. 103, s. 1. (4) 32 & 33 Vict. c. 62, pt. ii. s. 13.

(1) Archbold's Criminal Pleading,

Receiving  
stolen  
goods.

stolen (a misdemeanour only at common law), is by the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 91), made a felony if the principal crime (*i.e.* the taking, &c.) amounts to a felony at common law, or by that Act.

A receiver, where the principal crime amounts to a felony at common law, or by the Larceny Act, may be put upon his trial.

(a.) As an accessory after the fact to the principal crime ;

(b.) As having committed the substantive felony of receiving stolen goods.

The felonious taking of the goods must be proved, and the actual receipt into possession by the alleged receiver and his knowledge at the time he receives them of the original felonious taking.

Where the goods are received by a wife or servant in the husband or master's absence, the husband or master is guilty of the offence of receiving only when having a guilty knowledge he does some act approving of the receipt of the goods <sup>(1)</sup>.

On a trial for the offence, contrary to the usual practice of English law, proof may be given *at any time during the trial*, after evidence of possession has been tendered, of a conviction at any time within five years immediately preceding, of any offence involving fraud or dishonesty ; but seven days previous notice in writing must be given the accused that such proof is intended to be given <sup>(2)</sup>.

Felonious receiving is punishable by penal servitude to the extent of fourteen years. Where the original taking is only a misdemeanour, the subsequent taking is punishable by penal servitude to the extent of seven years <sup>(3)</sup>.

Misappropriation by  
factors or  
agents.

*Misappropriation by factors or agents* <sup>(4)</sup> is, by sects. 75-79 of the Larceny Act, made a misdemeanour (see *ante*, p. 1104, note).

Section 80 of the Larceny Act makes it a misdemeanour punishable with seven years' penal servitude as a maximum penalty, for a *trustee* <sup>(5)</sup> of any property for the benefit of any other person or for any public or charitable purpose, with intent to defraud, to misappropriate the same <sup>(6)</sup>.

Robbery.

*Robbery* is the felonious and forcible taking from the person of another against his will, of money or goods of any value, by violence or putting him in fear <sup>(7)</sup>.

Burglary.

*Burglary*, at common law, is when one "by night breaketh

<sup>(1)</sup> *R. v. Dring*, D. & B. 329 ; *R. v. Woodward*, L. & C. 122.

<sup>(2)</sup> 34 & 35 Vict. c. 112, s. 19.

<sup>(3)</sup> 24 & 25 Vict. c. 96, s. 95.

<sup>(4)</sup> Stephen's Digest, pp. 288, 289.

<sup>(5)</sup> See definition of "trustee,"

24 & 25 Vict. c. 96, s. 1.

<sup>(6)</sup> Archbold's Criminal Pleading, 20th ed. p. 526.

<sup>(7)</sup> Harris's Criminal Law, 5th ed. p. 261.

and entereth into a dwelling-house with intent to commit a Burglary. felony."

The Larceny Act also enacts that whosoever shall enter the dwelling-house of another with intent to commit any felony thereon, or, being in such dwelling-house, shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary <sup>(1)</sup>.

Night, for the purposes of this crime, is deemed to commence at nine in the evening and to conclude at six in the morning of the succeeding day <sup>(2)</sup>.

Both the breaking and entering must take place at night. If either be in the daytime it is not burglary.

The place must be a permanent building (there can be no burglary into a tent or booth, even though the owner reside there), and must be either the place where one is in the habit of residing, or some building between which and the dwelling-house there is a communication, either immediate or by means of a covered or enclosed passage leading from one to another <sup>(3)</sup>.

The house must also be the house of another; therefore, a person cannot be indicted for a burglary in his own house, though he breaks and enters the room of his lodger and steals his goods.

The breaking and entry need not take place at the same time, *e.g.* if a hole be broken one night and the same breakers enter through it the next night they are burglars <sup>(4)</sup>.

There must be an *actual* or *constructive* breaking, not a mere leaping over "an invisible ideal boundary, but a substantial forcible irruption," *e.g.* by taking out the glass of, or otherwise opening, a window, picking or opening a lock with a key, or by lifting up the catch of a door, or unclosing any other fastening <sup>(5)</sup>.

There is an *actual* breaking where an entrance is effected down a chimney, for that is closed as much as the nature of things will permit, but it is not an actual breaking to enter through an open window or door, nor to raise a window already partly open; but lifting the flap of a cellar which was kept down by its own weight has been decided to be a burglary <sup>(6)</sup>.

There is a *constructive* breaking where admission is gained by some device, there being no actual breaking, as to knock at a

<sup>(1)</sup> 24 & 25 Vict. c. 96, s. 51.

<sup>(2)</sup> 24 & 25 Vict. c. 96, s. 1.

<sup>(3)</sup> 24 & 25 Vict. c. 96, s. 53.

<sup>(4)</sup> 1 Hale, P. C. 551.

<sup>(5)</sup> 1 Hale, P. C. 552.

<sup>(6)</sup> *R. v. Russell*, 1 Mood. E. C. 377.

Burglary. door, and then rush in with a felonious intent, or enter under pretence of taking lodgings, and rob the owner of the house.

Any, the least degree of entry of any part of the body, or of an instrument held in the hand, *e.g.* a hook or other instrument put in at a window to draw out goods, is, however, sufficient.

To constitute this crime there must be an intent—whether it be actually carried out, or only demonstrated by some attempt or overt act—to commit some felony in the dwelling-house, otherwise it is only a trespass <sup>(1)</sup>.

The maximum punishment for burglary is penal servitude for life <sup>(2)</sup>.

Any person in any way *entering* a dwelling-house in the night with intent to commit a felony is guilty of felony, and liable to penal servitude for seven years <sup>(3)</sup>.

Any person found at night armed with any dangerous or offensive weapon or instrument with intent to break or enter any dwelling and to commit a felony therein, or found at night, without lawful excuse, the proof of which excuse lies on him, in the possession of any housebreaking implement, or with his face blackened or disguised with intent to commit a felony, or found at night in any building with intent to commit a felony, is guilty of a misdemeanour, punishable with penal servitude to the extent of five years <sup>(4)</sup>.

Breaking and entering any church, chapel, meeting-house, or other place of divine worship, and committing any felony therein, is also a felony punishable with penal servitude for life as a maximum <sup>(5)</sup>.

House-breaking.

*Housebreaking* is the offence of breaking and entering any dwelling-house, school-house, shop, warehouse, or counting-house, and committing any felony therein, or being therein committing any felony, and then breaking out. It is a felony punishable with a maximum penalty of fourteen years' penal servitude. In this case the breaking and entering may be in the daytime <sup>(6)</sup>.

Forgery.

*Forgery* may be defined as the fraudulent making or alteration of a writing or seal to the prejudice of another man's right, or of a stamp to the prejudice of the revenue <sup>(7)</sup>.

An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in

<sup>(1)</sup> 1 Hale, P. C. 561.

<sup>(2)</sup> 24 & 25 Vict. c. 96, s. 52.

<sup>(3)</sup> 24 & 25 Vict. c. 96, s. 54.

<sup>(4)</sup> 24 & 25 Vict. c. 96, s. 58.

<sup>(5)</sup> 24 & 25 Vict. c. 96, s. 50.

<sup>(6)</sup> 24 & 25 Vict. c. 96, s. 56.

<sup>(7)</sup> 2 East, P. C. c. xix., s. 60.

existence a specific person, ascertained or unascertained, capable of being defrauded thereby (1).

The instrument forged must so far resemble the true instrument as to be capable of deceiving persons who use ordinary observation (2). It may also be remarked that a slight material alteration is sufficient to constitute the offence (3). The name forged may be a purely fictitious one, if the intention be to defraud (4).

It is sufficient to prove a general fraudulent intention. It is a crime to *utter* a forgery, but it must be shown that at the time of uttering, the accused knew the document, &c., to be forged (5).

At common law forgery is a misdemeanour only, but the heinous character of the offence has caused many instances of it to be made felony by statute. The principal statute now dealing with the offence is the Forgery and False Personation Act, 1861 (6).

The False Personation Act, 1874, makes it a felony for any person falsely and deceitfully to personate any person, or the heir, executor, or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property. The maximum penalty for this offence is penal servitude for life, or any period not less than five years, or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement (7).

The False Personation Act, 1874.

False personation for the purpose of obtaining goods, money, &c., is a crime at common law, but particular classes of the offence are also dealt with specifically by various statutes passed with regard to the personation of seamen and soldiers in order to obtain their pay, wages or prize-money (8) and of stock or share holders (9).

*Malicious injuries to property* are dealt with by 24 & 25 Vict. c. 97.

Malicious injuries to property. Arson.

The offence of arson consists in the wilful and malicious setting fire to any building. The offence is punishable with varying

(1) Stephen's Digest, 4th ed. p. 296.

(2) *R. v. Callicott*, R. & R. C. C. R. 212.

(3) 2 East, P. C. c. xix. s. 4.

(4) *R. v. Lockett*, Leach, 91.

(5) *R. v. Aston*, 2 Russ. 732.

(6) 24 & 25 Vict. c. 98.

(7) 37 & 38 Vict. c. 36, s. 1.

(8) 28 & 29 Vict. c. 124, ss. 8, 9; 2 & 3 Wm. 4, c. 53, s. 49; 7 Geo. 4, c. 16, s. 38; *R. v. Lake*, 11 Cox, 333.

(9) 24 & 25 Vict. c. 98, s. 3; 26 & 27 Vict. c. 73, s. 14, as to Indian Stock; 30 & 31 Vict. c. 131, s. 35; Companies Act, 1867; 33 & 34 Vict. c. 58, s. 4, as to shareholders, National Debt Act, 1870.

severity: thus it is felony, punishable with penal servitude for life as a maximum, to commit arson of any place of divine worship<sup>(1)</sup>; a dwelling-house, any person being therein<sup>(2)</sup>; to any private building whether in the possession of the offender or any other person, with intent to injure or defraud any person<sup>(3)</sup>; to any public building<sup>(4)</sup>; to any stack of corn, hay, &c.<sup>(5)</sup>; to any mine of coal. Other species of arson are punishable with fourteen years' penal servitude as a maximum, *e.g.*, to commit arson of a building other than of the nature above indicated<sup>(6)</sup>; to any crop of hay, corn, &c.

Arson.

Sending letters threatening to burn any house, barn, or other building, or any stack of grain, hay, or straw, or other agricultural produce, is a felony punishable with penal servitude for ten years as a maximum<sup>(7)</sup>.

It should be noted that some portion of the house, &c., must be actually burnt; it is not enough that something in the house should be burnt<sup>(8)</sup>; the burning must be wilful, and therefore no negligence, however gross, will amount to the offence.

One description of arson is still punishable with death<sup>(9)</sup>; *viz.*, that of wilfully and maliciously setting fire to Her Majesty's ships of war, arsenals, shipbuilding materials, or munitions of war<sup>(10)</sup>.

Explosive  
substances.

Another very serious species of malicious injury to property arises from the improper use of *explosive substances*. Thus it is a felony punishable with penal servitude for life unlawfully and maliciously to cause an explosion likely to endanger life, or to cause serious injury to property, whether any injury to person or property has been actually occasioned or not. The possession of any explosive with intent to use it as above-mentioned, is punishable with penal servitude for twenty years as a maximum penalty<sup>(11)</sup>.

(1) 24 & 25 Vict. c. 97, s. 1.

(2) *Ibid.* s. 2.

(3) *Ibid.* s. 3.

(4) *Ibid.* s. 5.

(5) *Ibid.* s. 17.

(6) *Ibid.* s. 6.

(7) *Ibid.* s. 50.

(8) *R. v. Russell*, C. & Mar. 541.

(9) The Court, however, may order judgment of death to be recorded, which is equivalent to a reprieve of the prisoner: 4 Geo. 4, c. 48; Stephen's Digest, 4th ed. p. 14.

(10) 12 Geo. 3, c. 24.

(11) See as to the use of explosives, 45 Vict. c. 3.

## CHAPTER VIII.

## CRIMINAL PROCEDURE.

Having now noticed some of the principal and most characteristic crimes and offences known to English law, it will be desirable to treat briefly of "Criminal Procedure." Here it will be necessary to remember the great general division of breaches of criminal law into (A) offences punishable upon summary conviction; and (B) indictable crimes.

Offences which fall within the first division are dealt with before "Courts of Summary Jurisdiction," which consist in the country of justices of the peace to the number (in most cases) of two or more; in the city of London, of the Lord Mayor or an alderman (who sit in their capacity of justices of the peace); in the metropolis, outside the city, of a "Metropolitan Police Magistrate," and in certain populous places, of a "Stipendiary Magistrate." These courts are the creatures of a series of statutes; for at the common law no man could be punished save by the judgment of his peers, *i.e.* of a jury, or in case of a peer of the Lords. Their procedure is now regulated (as regards summary proceedings) by certain Acts of Parliament, of which the chief are 11 & 12 Vict. c. 43, and 42 & 43 Vict. c. 49. They are empowered under some circumstances to dispose of some *indictable* offences in a summary way <sup>(1)</sup>. On the other hand, it is provided that a person charged with an offence (other than assault) for which he is liable on summary conviction to be imprisoned for a term exceeding three months may, on appearing before the Court, and before the charge is gone into, but not afterwards, claim to be tried by a jury <sup>(2)</sup>. Moreover, any defendant imprisoned without the option of a fine may, unless in certain exceptional cases, *appeal* to the justices in general quarter sessions of the peace <sup>(3)</sup>—a tribunal of which we will speak presently. A right of appeal is also

Courts of  
Summary  
Jurisdiction.

<sup>(1)</sup> See 42 & 43 Vict. c. 49, ss. 10-15; and see *Reg. v. Miles*, 24 Q. B. D. 423, as to effect of previous conviction.

<sup>(2)</sup> 42 & 43 Vict. c. 49, s. 17. The defendant is to be informed of his right by the Court. The section does

not apply where the imprisonment is adjudged for failure to comply with an order for the payment of money, for the finding of sureties, for the entering into any recognizance, or the giving of any security.

<sup>(3)</sup> Sect. 19 of 42 & 43 Vict. c. 49.

given by various statutes in many other instances. Any person aggrieved who decides to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction in point of law, may require the Court to state a special case for the High Court. If the Court decline so to do, the High Court will compel it to state a case unless the point of law be merely frivolous, when the maxim *de minimis non curat lex* applies <sup>(1)</sup>.

It must not be forgotten that, besides these *judicial* functions, justices of the peace and magistrates discharge important *ministerial* duties by (in most cases) conducting the preliminary investigation into crimes which are ultimately to be tried by a jury. But this brings us to the consideration of the mode and manner in which indictable crimes are to be investigated.

Except in the case of a coroner's inquisition (*i.e.* for practical purposes, except in case of murder or manslaughter), there can be in this country no judicial or quasi-judicial investigation into an alleged crime until some person is actually charged with its commission. In theory the grand jury can inquire of felonies and misdemeanours, although no bill of indictment be preferred before them. In practice, however, they have long ceased to do anything of the kind.

The judicial inquiry, therefore, into a crime may be said in every case, save murder or manslaughter, to begin by preferring a charge against some one, or, in other words, by commencing a prosecution, for until some person is actually formally accused a prosecution cannot be said, in any proper sense, to have been commenced.

Commence-  
ment of  
Prosecu-  
tion.

A prosecution, then, may be commenced in six different ways, viz. :— <sup>(2)</sup>

1. By arrest of the accused without warrant in certain cases.
2. By issue and service of a warrant for the arrest of the accused.
3. By issue and service of a summons calling upon the accused to appear before a justice of the peace and answer the charge.
4. In cases of perjury, by the tribunal before whom the alleged false oath was taken summarily committing the accused to take his trial <sup>(3)</sup>.

<sup>(1)</sup> 20 & 21 Vict. c. 43; 42 & 43 Vict. c. 49, s. 33; *Ex parte Longbottom*, 45 L. J. (M. C.) 163; *Reg. v. Justices of Macclesfield*, 2 L. T. (N.S.) 352.

<sup>(2)</sup> There is yet another mode in which persons accused of certain of-

fences may, under some circumstances, be proceeded against, viz., by preferring articles of impeachment against them in Parliament. But with proceedings of that kind we need not here concern ourselves.

<sup>(3)</sup> 14 & 15 Vict. c. 100, s. 19.



5. In the case of certain misdemeanours by the filing of a "criminal information" in the Queen's Bench Division of the High Court of Justice by the Attorney-General or by the Master of the Crown Office. Commence-  
ment of  
prosecu-  
tion.

6. By at once preferring an indictment before a grand jury, without any preliminary steps taken.

The ordinary way of commencing a prosecution is by bringing the accused before a magistrate, either by warrant or summons, or by arrest without warrant. The magistrate must have jurisdiction over the place where the offence was committed. The proceedings before him are mainly regulated by 11 & 12 Vict. c. 42. It may be premised that both counsel and solicitors appear as advocates at the preliminary investigation <sup>(1)</sup>.

Prior to the legislation to which we shall next allude, a person though wholly innocent of any offence, might be very seriously injured in pocket as well as in reputation by a groundless accusation. To remedy this state of things, the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17) was passed. The  
Vexatious  
Indict-  
ments Act,  
1859.

The object of this Act was to provide <sup>(2)</sup> a check upon the practice of preferring charges, by way of bill of indictment, before a grand jury, who heard only the case for the prosecution, without any previous examination into the truth of the accusation by a magistrate, who on hearing the whole of the facts might decline to send the case for trial. It was accordingly enacted that no bill of indictment for any of the following offences, viz.: (1) perjury; (2) subornation of perjury; (3) conspiracy; (4) obtaining money or property by false pretences; (5) keeping a gambling-house; (6) keeping a disorderly house; (7) indecent assault, shall be presented to or found by a grand jury unless one of the following steps has been taken:—

(a) The prosecutor or other person presenting such indictment has been bound by recognizances to prosecute, or give evidence against the accused;

(b) The accused has been committed to or detained in custody, or bound by recognizance to appear and answer such indictment;

(c) The indictment has been preferred by the direction of, or with the consent in writing of, a judge of the High Court, or the Attorney or Solicitor-General; or

<sup>(1)</sup> Solicitors also appear as advocates before Courts of Summary Jurisdiction.

<sup>(2)</sup> See as to costs, *Stubbs v. Director of Public Prosecutions*, 24 Q. B. D 577.

The  
Vexatious  
Indict-  
ments Act,  
1859.

(d) In the case of an indictment for perjury, by the direction of any Court, judge, or public functionary authorized by 14 & 15 Vict. c. 100, to direct a prosecution for perjury.

By the 30 & 31 Vict. c. 35, s. 2, it was further provided that the Court trying an indictment for any such offence should have power, in the event of the acquittal of the accused, to order the prosecutor to pay his costs and expenses.

Various other offences now fall under the operation of the above-named Acts, viz.: misdemeanours under the second part of the Debtors Act, 1869 (*ante*, p. 953); offences under the Criminal Law Amendment Act, 1885; indictable offences under the Merchandise Marks Act, 1887.

The Law  
of Libel  
Amend-  
ment Act,  
1888.

Section 8 of the Law of Libel Amendment Act, 1888, provides in a similar spirit that "no criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the order of a judge at chambers being first had and obtained."

Prelimi-  
nary  
inquiry.

The preliminary inquiry begins by the examination of witnesses for the prosecution; but, before such examination, the justice may, if he think proper, allow counsel or solicitor for the prosecution, but not the prosecutor himself, to "open his case."

The justice may hold the preliminary inquiry with closed doors, admitting no one but the accused, his counsel, and solicitor, if it appear to him that the ends of justice will be best answered by so doing.

The witnesses for the prosecution must naturally in any case be examined in presence of the accused, and when the examination-in-chief of each witness is concluded the accused or his legal representative must have liberty to cross-examine, after which the witness may be re-examined. The evidence of each witness is to be taken down in writing in the form of a "deposition." At some time before the accused is called on for his defence, the deposition must be read over to the witness and signed both by him and by the justice.

At the end of the evidence for the prosecution the justice may, if he so choose, allow counsel or solicitor for the prosecution to "sum up" the case; but in the metropolitan Courts it is not the usual practice, in ordinary cases, to allow a second speech to the prosecution. The justice may then, if he thinks no sufficient case is made out, *discharge* the accused. If, however, the magistrate be of opinion that the prosecution have so far made out a *prima facie* case, he must then ask the accused

whether, having heard the evidence, he wishes to say anything in answer to the charge, and at the same time he should be cautioned that he is not bound to say anything, and that anything he does say may be used against him at his trial. Whatever is said by the accused in answer to this question is to be taken down in writing, and signed by the justice and by the accused himself, if he will <sup>(1)</sup>.

Preliminary inquiry.

The accused is then to be asked if he desires to call witnesses, and every witness called by him is to be heard, and if such witness appear material, his deposition is taken and signed as in the case of a witness for the prosecution. After hearing the evidence for the defence, the justice may alter his opinion, and come to the conclusion that the accused ought not to be put upon his trial <sup>(2)</sup>.

In such case he will, of course, discharge him.

If, however, on the other hand, a sufficient case be still, in the opinion of the justice, made out, he is to commit the accused to take his trial at the next practicable sittings of the court of oyer and terminer or of quarter sessions of the peace which has jurisdiction to try his offence <sup>(3)</sup>.

Let us now consider briefly the nature of these several Courts, which are the Courts ordinarily established for the trial of criminal offences upon indictment.

Courts for the trial of criminal offences upon indictment.

(a) *Courts of Oyer and Terminer and General Gaol Delivery.* These are Courts held by commissioners sitting under commissions from the sovereign, commissions of oyer and terminer, *i.e.* to hear and determine the criminal cases brought before them, and of general gaol delivery, *i.e.* to deliver the gaols of prisoners awaiting trial within the local limits pointed out by the commissions. It is under commissions of this description that the judges of assize sit and try prisoners. A special Court of oyer and terminer and general gaol delivery was created for the city of London, the county of Middlesex, and certain portions of the other metropolitan counties by the Central Criminal Court Act <sup>(4)</sup>.

(b) *Courts of Quarter Sessions of the Peace* held four times a

<sup>(1)</sup> It is not the practice in the Metropolitan Police Courts to invite the accused to sign.

<sup>(2)</sup> It may be as well to notice here that a discharge by a justice does not prevent the accused being again charged with the same offence before the same or another justice.

<sup>(3)</sup> The material witnesses, whether for the prosecution or defence, are to

be bound over to give evidence. Witnesses for the prosecution will, after the trial, get their expenses from the county funds, unless they are disallowed by the Court. Witnesses for the defence, bound over, will get their expenses, if allowed.

<sup>(4)</sup> 4 & 5 Wm. 4, c. 36. This Court has jurisdiction (sect. 22) to try offences on the high seas.

Courts for the trial of criminal offences upon indictment.

year in every county of England and Wales, before such of the justices of peace for the county as choose to attend. These Courts are empowered to try all indictable offences with juries save those enumerated in the list given in the note <sup>(1)</sup>.

In many counties the justices, when occasion requires, hold Courts oftener than four times a year by adjournment from the quarter sessions last preceding, and in the county of London there are special arrangements for fortnightly sessions.

Many cities and boroughs possess separate Courts of quarter sessions. Such Courts are held before the recorder of the city or borough, or his deputy, and they possess the same jurisdiction within their own limits as the quarter sessions of the county at large.

When a person charged with an indictable offence triable at quarter sessions has been committed to gaol or admitted to bail by a justice or justices, the trial shall take place at the next practicable quarter sessions, in the absence of direction to the contrary for special cause <sup>(2)</sup>.

Ordinarily, after the committal of the accused, the next step

(<sup>1</sup>) I. Treason or misprision of treason.

II. Any offence punishable with death or penal servitude for life.

III. Offences against the Queen's title, prerogative, person, or government, or against either House of Parliament.

IV. Offences subject to penalties of *præmunire*.

V. Blasphemy and offences against religion.

VI. Administering or taking unlawful oaths.

VII. Perjury and subornation of perjury.

VIII. Forgery, whether at common law or not.

IX. Unlawfully and maliciously setting fire to crops of corn, grain or pulse, or to any part of a road, copse, or plantation of trees, or to any heath, gorse, furze, or fern.

X. Bigamy and offences against the marriage laws.

XI. Abduction of women and girls.

XII. Concealment of birth.

XIII. Libels.

XIV. Bribery of all kinds and undue influence at parliamentary elections: 5 & 6 Vict. c. 38; 17 & 18 Vict. c. 102, s. 10.

XV. Any unlawful combination or

conspiracy, unless to commit an offence triable at sessions.

XVI. Stealing, or fraudulently taking, or injuring, or destroying records or documents belonging to any Court, or relating to any proceedings therein.

XVII. Stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest therein.

XVIII. Frauds by trustees, bankers, attorneys, agents, &c.: 24 & 25 Vict. c. 96, s. 87.

XIX. Offence of three or more entering, armed, on land in the night time, for the purpose of taking game: 9 Geo. 4, c. 69, s. 9.

XX. Offences against False Personation Act, 1874 (37 & 38 Vict. c. 36), s. 3.

XXI. Offences against Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 17.

All these exceptions from the sessions jurisdiction, save any for which other authority is cited, are by force of the statute 5 & 6 Vict. c. 38.

<sup>2</sup>) Assizes Relief Act, 1889 : & 53 Vict. c. 12).

in the prosecution is the preferment of a "bill of indictment" against him before the grand jury of the Court to which he has been committed. The grand jury must consist of not more than twenty-three, and not less than twelve, returned by the sheriff for that service <sup>(1)</sup>, the reason being that the bill must be found by the majority, and the majority must consist of twelve at least. At the commencement of the sittings of the Court, the grand jurors are "charged" by the presiding judge or the chairman of quarter sessions (as the case may be) as to the cases which are likely to come before them. They then retire to the grand jury room and enter upon consideration of the various "bills" brought before them. A "bill of indictment" is the formal written accusation laid before the grand jury. Until "found" by them to be a "true bill," it is properly described merely as a "bill," or a "bill of indictment," and it does not become, in strictness, an "indictment" until "found." The indictment must be upon parchment, and prepared according to the rules of criminal pleading, which are of a highly technical description.

Bill of indictment.  
Grand jury.

The powers of amendment possessed by the Court in criminal cases are limited, being in effect confined to such matters as names and descriptions of persons, places, and things <sup>(2)</sup>. Thus, where in an indictment for obtaining by false pretences the words "with intent to defraud" were omitted, it was held that they could not be inserted by way of amendment, and the indictment was quashed <sup>(3)</sup>.

Amendment.

When the bill has been taken to the grand jury room, it will come under consideration in its turn. The grand jury will examine the witnesses in support of the charge (whose names will beforehand have been indorsed on the bill), on oath or affirmation. They may insist upon the same strictness of proof in all respects as will be required at the trial. This, however, is a matter entirely for themselves to decide. If a *prima facie* case should appear to at least twelve of the grand jury to have been made out by the prosecution (for the defence has no *locus standi* before this tribunal; the accused is not present, nor are

Grand jury.

(1) Styled the Queen's liege people. 11 Hen. 4. c. 9 is repealed by 26 & 27 Vict. c. 125. In the case of grand jurors returned to serve before Courts of oyer and terminer or gaol delivery, no particular qualification is required; but in practice they are always county gentlemen of position. As to grand jurors at quarter sessions, see 6 Geo. 4, c. 50, s. 1; 5 & 6

Wm. 4, c. 76, s. 121, and as to borough juries, 45 & 46 Vict. c. 50, s. 186, sub-s. 1.

(2) 14 & 15 Vict. c. 100, ss. 1, 2, 3; *R. v. Frost*, Dears. 474; *R. v. Bailey*, 6 Cox, 29; *R. v. Wright*, 2 F. & F. 320; *R. v. Western*, L. R. 1 C. C. R. 122; *R. v. Gumble*, L. R. 2 C. C. R. 1.

(3) *R. v. James*, 12 Cox, 127.

Grand  
jury.

his witnesses heard), their clerk will indorse the bill "a true bill." If otherwise, he will indorse the words, "no true bill." In the first case the bill is said to be "found"; in the second "thrown out," or "ignored." Afterwards, the foreman of the grand jury and some of the other grand jurors carry the found and ignored bills into Court and deliver them to the clerk of arraigns or his deputy, or (at sessions) to the clerk of the peace or his deputy, and the clerk thereupon states to the Court the substance of each bill and the indorsement upon it.

If the bill against the accused be ignored, there is an end of the prosecution, and, if he be in custody, the Court will order his discharge, unless he be detained for some other lawful cause. The ignoring of the bill is, however, no bar to fresh proceedings being begun against him for the same offence.

Pleas.

If the indictment be found before a Court which has no jurisdiction over the offence, the accused may "plead to the jurisdiction" (a course seldom taken). If the indictment appears bad on the face of it in some point of substance the defendant may either (a) *demur* to it, or (b) move to *quash* it; the latter course being the more usual <sup>(1)</sup>. It should, however, be stated that even if the defendant have judgment upon his demurrer, or succeed in quashing the indictment, he may still be tried for the same offence upon another and better indictment; for the maxim is that "no man shall be twice *put in peril*," and upon the indictment bad in substance he was never "in peril" at all in contemplation of law.

Special  
pleas.

If the accused do not either plead to the jurisdiction, plead in abatement, demur, or move to quash, he may either plead one of the following four "special pleas," "in bar," viz.:—

- (a) "Autrefois acquit,"
- (b) "Autrefois convict,"
- (c) Pardon,
- (d) In cases of defamatory libel, justification; or else plead the "general issue," *i.e.*, "not guilty."

(a and b.) The pleas of "autrefois acquit" and "autrefois convict," viz., that the accused has been before acquitted or convicted of the offence charged in the indictment may be conveniently considered together. These pleas ought properly to be in writing and on parchment and (as it seems) signed by counsel. However, the Court will not reject the plea because it is informal, but will assign counsel to prepare it in a proper

<sup>(1)</sup> See as to "plea to the jurisdiction," and "demurrer," Archbold, *Crim. Pl.*, 20th ed. p. 140, *et seq.*, and

cases there cited, but especially *R. v. Faderman*, 1 Den. 565; *R. v. Goldsmith*, L. R. 2 C. C. R. 74.

form for the accused <sup>(1)</sup>. If, on the trial of an issue on a plea of this kind, it appears that the evidence *necessary* to support the second indictment would have been sufficient to procure a legal conviction upon the first, the defendant ought to succeed <sup>(2)</sup>.

Special  
pleas.

The third special plea <sup>(3)</sup> of the Queen's pardon need not be discussed here, inasmuch as it now scarcely ever occurs in practice.

All these three pleas may be pleaded together, and must be disposed of before the accused is called on to plead over. If every such plea be disposed of in favour of the prosecution, the accused may still plead "not guilty."

The fourth (*d*) special plea, of justification occurs only in cases of defamatory libel (for in cases of seditious, or blasphemous, or obscene libel, it is not permitted). The plea of justification must be in writing, but need not be on parchment. It is of a technical nature in point of form; for in pleading such a plea the defendant must allege the truth of the matters in the libel in the manner which in 1844 was required in pleading a justification to an *action* for defamation, and must further allege a particular fact or particular facts to show that the publication of the libel was for the public benefit <sup>(4)</sup>. It may be pleaded together with "not guilty," and both issues will be inquired of together by the jury <sup>(5)</sup>.

The more ordinary course is for none of these special pleas to be relied on, but for the accused to plead simply either "guilty" or "not guilty." It may be, however, that upon his being called on to plead, or (in the old language of the law) upon his "arraignment," he may refuse to plead at all. In such case a jury is to be empanelled to say if he stand "mute of malice," or "by the visitation of God." In the first alternative the Court may direct a plea of "not guilty" to be entered <sup>(6)</sup>. In the second case it seems the jury are further to inquire if the prisoner can understand the proceedings and make his defence, and, if they find he can, the Court will use such means as are available to ascertain what the accused desires to plead, and failing success will enter a plea of not guilty <sup>(7)</sup>. But if,

Pleas of  
"guilty"  
and "not  
guilty."

<sup>(1)</sup> *R. v. Chamberlain*, 6 C. & P. 93.

<sup>(2)</sup> The law on this subject was most carefully considered in the case of *R. v. Serne* (No. 2), see 16 Cox C. C. 311.

<sup>(3)</sup> A statutory pardon need not be pleaded, unless (as it seems) there are exceptions in it. Forb. 43; 2 Hale, 252.

<sup>(4)</sup> 6 & 7 Vict. c. 96, s. 6.

<sup>(5)</sup> If, when a plea of justification is pleaded, the accused be convicted, the Court (it is expressly provided) may, in pronouncing sentence, consider whether his guilt is aggravated or mitigated by such plea: 6 & 7 Vict. c. 96, s. 6.

<sup>(6)</sup> 7 & 8 Geo. 4, c. 28, s. 2.

<sup>(7)</sup> *R. v. Pritchard*, 7 C. & P. 303; 1 Chit. Crim. Law. 417.

Insanity of  
accused.

either at this time or at any time after indictment found, and before verdict given, it appears to the Court that there is sufficient reason to doubt whether the accused be not incapable, on account of insanity, of conducting his defence, it may order instead that an issue be tried whether he be, on account of insanity, unfit to take his trial. If the jury find him fit to take his trial, then the arraignment or the trial proceeds as though no such issue had been directed; but if they find him unfit, on account of insanity, the Court shall order him to be kept in custody as a criminal lunatic during Her Majesty's pleasure.

If the accused plead "guilty," there is an end of the proceedings, and it only remains for the Court to pass sentence <sup>(1)</sup>. Under the plea of "not guilty" every species of defence may be relied on, save those covered by the four special pleas already noticed.

Challenges.

Upon the defendant's pleading any other plea or pleas than "guilty," the next proceeding is to empanel a petty jury <sup>(2)</sup>, to try the issue, or the first of the issues, raised by the plea or pleas. The accused may before the jury is sworn either "challenge to the array," *i.e.* object to the whole jury panel, or "challenge to the polls," *i.e.* object to individual jurymen. A "challenge to the array" is on the ground of some partiality or default of the sheriff in returning the jurors. The more ordinary challenge is to the polls, and these challenges are of two kinds "peremptory" or "for cause." Peremptory challenges are only in treason and felony. A peremptory challenge is a challenge without reason assigned, and which the Court is bound to allow without more. In case of treason, with certain exceptions, the prisoner is allowed thirty-five peremptory challenges; in felonies, twenty challenges <sup>(3)</sup>. The *prosecution* has no right to challenge peremptorily, but may require any number of jurors to "stand by" without being sworn until the jury panel is exhausted. When this has been done, if a sufficient number of jurymen have not been obtained, the names of those ordered to "stand by" are called again, and, if the

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<sup>(1)</sup> Sometimes an accused person is allowed by the Court, upon personal application, to withdraw a plea of "Guilty" and plead "Not guilty." Indeed, it may be taken as a general rule of practice that such an application will not be refused by the Court. It must, however, be made by the accused in person, and not by his

advocate.

<sup>(2)</sup> It may be well to point out that the "petty" jury simply means the "little" jury, so called to distinguish it from the "grand" (or "large") jury.

<sup>(3)</sup> Arch. Crim. Pleading, 20th ed. p. 169, *et seq.*



prosecution still wish to exclude them or any of them, good cause must be shown for doing so. Both the prosecution and the defence may challenge any number of jurors "for cause." These challenges are in certain cases determined by the Court, and in certain cases by two "triers" sworn for the purpose. A challenge is too late if made after the words of the oath are repeated, but before the book is kissed <sup>(1)</sup>. Challenges.

When the accused is "in charge of the jury" the trial proper begins. The counsel for the prosecution <sup>(2)</sup> may, if he please, "open the case" in a speech to the jury, and he will then proceed to call his witnesses in the ordinary manner, the accused or his counsel being afforded an opportunity of cross-examining each witness at the conclusion of the examination-in-chief, and the prosecuting counsel (if he deem it necessary) re-examining upon any matter arising out of the cross-examination. At the end of the case for the prosecution it is usual for counsel for the Crown to put in evidence the statement of the accused (if any) before the justice, if he think it material; but there is no obligation on him to put it in <sup>(3)</sup>. If the accused be represented by counsel, and that counsel do not call witnesses, the prosecuting advocate has the right of "summing up" his case. When the accused defends himself no such right exists <sup>(4)</sup>. Trial.

The accused, or his counsel, will then address the jury, and, if witnesses are called for the defence, may do so twice, once in opening the case and once in summing it up. If evidence is given for the defence, the counsel for the prosecution has a reply, and this whether the accused have counsel or not.

After both prosecution and defence have been heard, the judge sums up the case to the jury, who then consider their verdict. This verdict must be unanimous. If the jury disagree they may be discharged, and the prisoner must be tried by another jury <sup>(5)</sup>.

The effect of a verdict of "not guilty" is that the accused is for ever free and discharged from that accusation, and he is

<sup>(1)</sup> Archbold, *ubi supra*; 3 Edw. 1, c. 4; 6 Geo. 4, c. 50, s. 293; *Mansell v. R.*, 8 E. & B. 54. See an abstract of the learning on this subject, Archbold, *Crim. Pl.*, 20th ed. p. 169.

<sup>(2)</sup> The prosecutor himself cannot address the jury or conduct the case. See authorities collected, *R. v. Gurney*, 11 Cox C. C. at p. 422.

<sup>(3)</sup> It must be remembered that in no case can counsel for the prisoner put in this statement, as it is not

evidence in his favour: *R. v. Haines*, 1 F. & F. 86.

<sup>(4)</sup> 28 Vict. c. 18, s. 2.

<sup>(5)</sup> The jury may, if they please, find a "special verdict" setting out the facts of the case (but not the evidence), and leaving the Court to draw the legal conclusion of "Guilty" or "Not guilty" on such facts. For a recent example of such a special verdict, see the famous case of *R. v. Dudley* (*ante*, p. 1169).

entitled to be at once set at liberty, unless there be some other legal ground for his detention.

Insanity of accused.

If the jury find that the accused was, on the ground of insanity, not responsible in law at the time of the alleged offence, the Court shall order him to be kept in custody as a criminal lunatic during Her Majesty's pleasure. He cannot afterwards be tried for the same offence.

Verdict.

The next step, where the verdict is "guilty," or the accused has pleaded "guilty," is for the officer of the Court, in case of treason or felony, to ask him whether he has anything to say why sentence should not be passed upon him, according to law.

Motion in arrest of judgment.

At any time before sentence the accused may "move in arrest of judgment," but such a motion can only be made on certain technical grounds, and not on the merits of the case.

Sentence.

If no such motion be made, or if the Court decide such motion adversely to the accused, the Court may proceed to pass sentence. If the accused be a woman, and the sentence passed be that of *death*, she may move to *stay execution* on the ground of her pregnancy <sup>(1)</sup>.

Writ of error.

There is in English law no *appeal*, properly so called in indictable offences <sup>(2)</sup>. But advantage can be taken of many technical irregularities by suing out what is called a "writ of error" in the Queen's Bench Division of the High Court, and if such Division decide against a defendant he may appeal to the Court of Appeal, and thence to the House of Lords. A writ of error cannot issue without the *fiat* of the Attorney-General.

Court for the Consideration of Crown Cases Reserved.

The judge, commissioner, justice of the peace, or recorder, before whom the case was tried may in his discretion reserve any question of law which may have arisen at the trial for the consideration of the judges of the Queen's Bench Division of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice, unless prevented by illness, must be one <sup>(3)</sup>. These justices sitting to consider questions so reserved are styled the "Court for the Consideration of Crown Cases Reserved." Upon consideration of the question reserved, and (if counsel

<sup>(1)</sup> By one of the quaint survivals of our law the procedure then is for a jury of twelve "matrons" to be empowered to try whether or not she be "with child of a quick child." If they find for the prisoner the Court must respite until either she be delivered of a child, or until it become impossible in the course of nature that she should be so delivered.

<sup>(2)</sup> See as to appeal against order of attachment, *O'Shea v. O'Shea and*

*Parnell*, 15 P. D. 59, where it was held that contempt of Court in the publication of comments calculated to prejudice the fair trial of an action falls under the words "a criminal cause or matter" in sect. 49 of the Judicature Act, 1873, and that therefore there is no appeal.

<sup>(3)</sup> Archbold Crim. Plead.; 11 & 12 Vict. c. 78; *R. v. Clark*, L. R. 1 C. C. R. 54.

appear) upon hearing argument they “reserve, affirm, or amend” any judgment which shall have been given <sup>(1)</sup>.

Besides the trial of prisoners, the Courts of Quarter Sessions also hear appeals from summary convictions and summary orders in civil or quasi-civil matters. Such appeals are heard before the Court itself without the intervention of a jury. An important portion of such appeals formerly arose upon questions in regard to the *settlement of paupers*, a matter upon which a vast amount of now for the most part obsolete learning exists. A discussion of the poor laws would be quite beyond the scope of this work. The whole matter of settlement has been much simplified by the 39 & 40 Vict. c. 61, s. 33, and the law in regard to it has become of less importance since the passing of the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79).

Appeals to  
Courts of  
Quarter  
Sessions.

Settlement  
of paupers.

At the present day much of the most important appeal work at Quarter Sessions consists of appeals in *rating matters*; but for this peculiar branch of the law special works must of necessity be consulted <sup>(2)</sup>.

Rating  
matters.

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And here, in bringing to a conclusion these Commentaries on the present Laws of England, a few words may be appropriately addressed to the friendly reader who has thus far followed the progress of the work. The aim of the author throughout has been to give (so far as is possible within the limited space at his command) a comprehensive statement of the present condition of English law, bringing into special prominence the present and living law, and only dealing with past law, or that which is practically obsolete, so far as it is necessary to make the reader understand the present. English law, described by Lord Tennyson, with perhaps some slight poetic exaggeration, as—

“The lawless science of our law,  
That codeless myriad of precedent,  
That wilderness of single instances;”

and characterised by Hallam more than a quarter of a century

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<sup>(1)</sup> 11 & 12 Vict. c. 78, s. 2.

<sup>(2)</sup> As to the Poor Laws, see Burn, ‘Justice of the Peace,’ vol. iv. As to the jurisdiction of Courts of Summary Jurisdiction in matters not criminal,

and the appeal therefrom in such cases to Quarter Sessions, see Stone, ‘Practice for Justices of the Peace,’ part 2; and Mead & Croft, ‘Practice of Quarter Sessions.’

ago, as the accumulation of statute upon statute and precedent upon precedent, "till no industry can acquire nor any intellect digest, the mass of learning that grows upon the panting student," is every year becoming more and more complicated by the changes introduced by legislation and judicial decision. And while eternal vigilance (to adapt the phrase of a great writer) in observing these changes, be they more or less important, is the price which must be paid to secure freedom from disastrous error, the student of law will find that his only chance of grappling successfully with the difficulty is to obtain a wide knowledge of established principles, combined with a readiness for mastering the details of each question as it arises.

Throughout the work, accordingly, the utmost pains have been taken to supply the reader not only with statements of principles as settled by the latest authorities, but also with references to decided cases and standard treatises where the best and latest knowledge can be obtained with reference to the various subjects discussed. The writer ventures to hope that these volumes, the result of much arduous labour on his part, largely assisted by friendly aid which he most gratefully acknowledges, may not only afford substantial assistance to professional students and practitioners, but may also prove of interest to those outside the legal profession, who desire to become acquainted with the present state of English law.

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